

MODERN REPORTS;
R,
SELECT CASES

ADJUDGED IN
THE COURTS
OF
KING'S BENCH,
CHANCERY, COMMON PLEAS,
AND
EXCHEQUER.

VOLUME THE SEVENTH.

MODERN REPORTS;

SELECT CASES



KING BEN CH.
CHANCERY COMMON PLAS.

EXCH. QUER.

VOLUME THE SEVENTH

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OR,

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OF

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AND

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VOLUME THE SEVENTH;

CONTAINING,

A COLLECTION OF CASES argued and adjudged in THE COURT OF KING'S BENCH, at Westminster, in the Reign of QUEEN ANNE, during the time Sir JOHN HOLT, *Knight*, was Chief Justice of the Court.— Taken by THOMAS FARRESLEY, *of the Middle-Temple, Esq.*

TO WHICH IS NOW ADDED,

A COLLECTION OF CASES argued and determined in THE COURTS OF KING'S BENCH, COMMON PLEAS, and CHANCERY, from Easter Term in the Sixth Year of GEORGE THE SECOND to Michaelmas Term the Eighteenth of GEORGE THE SECOND.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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MODERN REPORTS

SELECT CASES

THE COURTS

KING'S BENCH

CHANCERY COMMON PLEAS

EX. H. E. O. R.

VOLUME THE FIFTH



THE FIFTH EDITION

BY THOMAS LEACH, ESQ.

LONDON

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EASTER

EASTER TERM,

The First of Queen Anne,

IN

The Queen's Bench.

1702.

Sir John Holt, Knt. Chief Justice.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Edward Northey, Esq. Attorney General.

Simon Harcourt, Esq. Solicitor General.

• Memorandum.

• [1]

Case 1.

THE FIRST RETURN of this Term was, by proclamation, cut off, and THE TERM adjourned to the second return. Term adjourn-
ed.
Post. 152.

1. Sid. 276. 1. Lev. 176. 178. 1. Keb. 942. 2. Keb. 76. 152.

Wright against Crump.

Case 2.

PER CURIAM. If the jury in an inferior court will not agree in their verdict, the way is, as in other courts, to keep them without meat, drink, fire, or candle, until they agree; and THE STEWARD may adjourn the court from time to time until they agree. Jury in an infe-
rior court shall
be kept together
until they agree.

S. C. Holt's

Rep. 404. 1. Salk. 201.

SECONDLY, Generally a *levari facias* is not the process of A HUNDRED-COURT, but it may be it by custom; and generally the proper process in a hundred-court. A *Levari facias* not
the proper pro-
cess in a hun-
dred-court. Post. 44.—1. Salk. 201. 2. Lev. 81. Comb. 124. Lutw. 583.

VOL. VII.

B

all

Easter Term, 1. Queen Anne, In B. R.

WRIGHT
against
CAMP.

all the hundred-courts in *England* have such a custom : the true common-law process is a *distingas*.

Attachment on
contempt of ju-
dicial officers.
Post. 38. 84.

THIRDLY, All misdemeanors in a judicial officer is a contempt of this court, and every day AN ATTACHMENT is granted against a bailiff of an inferior court for granting an attachment against all the parties goods.

S. C. 1. Salk.
201.
S. C. 2. Ld.
Ray. 766.
Ld. Ray. 462.
556.

And HOLT, *Chief Justice*, remembered a case of the *Mayor of Hertford*, where a court was held before him only, and he, pretending right to a house, made himself lessor of the plaintiff, and gave judgment for his own lessee ; and for this he was brought up by ATTACHMENT, and laid by * the heels ; though he got off the easier, for that he had been an old cavalier : this he said was in my LORD HYDE's time. But on the other hand, an officer is not to be punished for an error in his judgment.

* [2]

Verdict on a ju-
ror's knowledge.

S. C. Holt's
Rep. 404.
1. Salk. 405.
Stra. 642.

PER HOLT, *Chief Justice*. If a jury give a verdict upon their own knowledge, they ought to tell the Court so ; but the fair way had been, for such of the jury as had knowledge of the matter, before they are sworn, to tell the thing to the Court, and be sworn as a witness.

Jury discharged
from verdict.

1. Salk. 201.
3. Mod. 95.
189. 336.
Ld. Ray. 766.

NOTE, All this was said by the Court upon a motion for AN ATTACHMENT against a steward of an inferior court, who had discharged a jury without giving a verdict.

But THE COURT would hear further before they granted an attachment.

Cafe 3.

Doctor Woodward's Cafe.

At what time
judgment on a
warrant of at-
torney may be
entered.

S. C. post. 13.
93.
Post. 115. 139.

1. Salk. 402.
6. Mod. 14. 16.
187.
Com. Rep. 117.
Tidd's Pract.
694. 706.

THE QUESTION was upon the regular entry of a judgment upon a warrant of attorney.

PER CURIAM. If a year pass after a warrant of attorney given, judgment cannot be entered upon it without leave of the Court ; but if one give a warrant in Vacation to give judgment as of last Term, his death does not determine that warrant, because the party was alive at the time of the judgment entered ; and the time of entering the judgment is not expressed on the roll, but in the margin, and the use of it is for the security of purchasers only ; but without it, it is good against the party.

Also, if a defendant make default, so as the plaintiff might have entered judgment against him, and before actual entry the defendant dies, yet the plaintiff may enter his judgment as of the Term in which default was made.

HOLT, *Chief Justice*, quoted *Shelley's Cafe* (a), who died at four o'clock in the morning of the day on which the recovery was ; so that if you reckon hours or minutes, he was dead at the time of

(a) 1. Co. 93. 2. And. 69. Moor, 136. Jenk. 249.

Easter Term, 1. Queen Anne, In B. R.

the recovery had; yet it was held good: so if the caption of a fine be taken in the Vacation, if the writ be returnable the next Term, the death of the party determines it; but if it be returnable the Term before, it shall be well, notwithstanding the party's death.

Docton
Woodward's
Case.

Anonymous.

Case 4.

IF A JUDGMENT be below for the plaintiff, and a writ of error is brought and the judgment reversed, yet, if the record will warrant it, the Court ought to give a new judgment for the plaintiff; but if the judgment be erroneous and against the plaintiff in the merits, that ought to be reversed, and a new judgment given for the defendant.

Erroneous judgment.

* [3]

Comb. 314.
1. Saund. 180.
2. Saund. 256.
1. Salk. 262.
401.
1. Ld. Ray. 9.

PER CURIAM. If an erroneous judgment be for a defendant, and it is reversed, and the merits appear for the plaintiff, he shall have judgment; but if the merits be against the plaintiff, the defendant shall have a new judgment: so in THE EXCHEQUER-CHAMBER; for they are to reform as well as to affirm or reverse.

Atwood against Burr.

Case 5.

Easter Term, 13. Will. 3. Roll 46.

ERROR OF A JUDGMENT on a scire facias against bail in THE MAYOR'S COURT of Maidstone.

Error on a judgment in inferior court against bail on a scire facias.

The writ recited, that a plaint was levied in debt upon a bond against J. S. by the plaintiff, on the seventeenth day of July, the sixth year of the king, "in curia domini regis villae regis de Maidstone;" and that thereupon a summons issued, returnable the thirty-first of July, and, after a nihil thereunto returned, a *capias* returnable the fourteenth of August following, by which the defendant being taken, and appearing on the return of the *cepi corpus*, the defendant became his bail, and entered into a recognizance to pay the condemnation with costs and charges of suit. The *scire facias* further recited a former *scire facias*, and commanded the officer *sicut prius*, &c. A *scire feci* was returned, and judgment given against the bail.

S. C. Carth. 447.
S. C. Lilly Ent. 228. 290. 403.
S. C. 2. Ld. Ray. 821.
1. Salk. 404.
5. Mod. 304.
Comb. 149. 162.
A Ld. Ray. 216.
Fitzg. 275.

And in Michaelmas Term, in the thirteenth year of William the Third, upon the writ of error, many exceptions were taken.

FIRST, That in this case the inferior court can only award execution of goods, lands, and tenements, within their jurisdiction, and therefore the *scire facias* ought to run so, and not generally as here.

How execution in an inferior court may be given.

HOLT, Chief Justice, answered, that the recognizance is well taken, "that in case judgment be against the defendant to levy the condemnation of his goods and chattels, lands and tenements;" that the common course of the court of king's bench is so,

Easter Term, 1. Queen Anne, In B. R.

Arwood
against
Benn.

although in the court of common pleas they bind in a sum certain; and that the summons need not be cramped up by words to the jurisdiction of the court, for that shall be understood.

Damages in-
cludes costs,
when the action
is for a debt cer-
tain.

N. Lutw. 185.

SECONDLY, After issue joined, and a *venire facias* to try it, the defendant in the original *relicta verificatione cognovit actionem*, and judgment against him in one hundred pounds *debt*, and fifty pounds *damages*, without any mention of *costs*, and the prayer of the *scire facias* against the bail is to have execution *de debito et damnis*, so not according to his recognizance.

HOLT, *Chief Justice*. Where the demand is of a debt certain, one need say no more than *damna* to include *costs*; except it be on taking a verdict on a trial where *costs* are to be mentioned; but upon confession, *nihil dicit*, &c. it is never, or, at least, need never be done.

Process from an
inferior court in
the name of the
mayor is good.

THIRDLY, The *scire facias* is in the *mayor's name*, whereas it ought to be in the *king's name*, and *tested* by the mayor, it being a process of the king's court.

HOLT, *Chief Justice*, answered, that it is the constant practice of all inferior courts to make the process in the name of THE MAYOR.

*[4]

On a writ of er-
ror, a variance
between the *scire
facias* and the o-
riginal record is
immaterial.

*FOURTHLY, The *scire facias* recites a plaint levied the seven-
teenth of *July*, and on the record it appears to have been on the
fourteenth of *July*.

HOLT, *Chief Justice*, answered, that upon a *writ of error* there can be no advantage taken of a *variance* between the writ of *scire facias* and the original record.

Form of process
on a recogni-
zance.

FIFTHLY, In a *scire facias* against a recognizance, it should be
in eâ parte, and here it is in *hâc parte*.

HOLT, *Chief Justice*, answered, that it is true the right way is not to say "*in hâc parte*," in process upon a recognizance; but that it has now obtained so long as to make it good either way; and we must not hinder it.

Scire facias on a
recognizance in
an inferior court.

SIXTHLY, The command of the writ ought to be to summon
the party, if found within the jurisdiction: but here it is gene-
ral.

HOLT, *Chief Justice*, answered this exception as in the answer
to the first exception.

SEVENTHLY, Here went an *alias scire facias*, upon which this
judgment is; and the first *scire facias* is not returned; and so they
threw on the record.

HOLT,

* HOLT, Chief Justice, as to this exception, which was the chief, asked the Counsel on the other side, how they could proceed upon a *scire facias* which was not returned, as here the first was not; for there ought to be some answer to the writ; as that the party had nothing, &c. that he *scire fecit*, or *non est inventus*; for if there be no return, I doubt it will be a *discontinuance*, and that cannot be cured by *appearance*; but after verdict a *miscontinuance* is cured, and there being no return to the first, or so much as a recital of it on the second, but only "*sicut prius præceptum est*," it will be hard to maintain it; and if you do not appear at the return, you cannot appear at all, if the process be not continued down. If there be an *original* returnable in *Trinity Term*, and the defendant do not appear, but come in *Hilary Term*, all is wrong, if there be not a continuance to *Hilary Term* down duly entered. If *scire facias* be returnable *die Jovis prox. post tres septim. S. Michael.* if the party appear *crast. S. Martini*, it will be an incurable gap, for none can appear when he has no day by the writ or on THE ROLL, and here is neither. And suppose the first *scire facias* had been well returned, and an *alias* had issued out returnable in *June*, and the defendant appeared in *August*, all would be bad without a continuance entered until *August*; because without it the defendant has no day in court. But he said, perhaps the want of a return of the *scire facias* might be cured by the day on THE ROLL, where the *teste* and issuing out of the writ is, which perhaps may be a ground for an *alias*, and also a day for appearance. And he said, that upon pleading the *statute of Limitations* he always used to plead the *return* and not the *purchase* of a writ; for it was the return that gave the possession of the cause to the Court (a). And if one were to continue a *latitat* for several years, he must get the first returned; upon which return you make your continuances down, though you never take out another; but there must be a return of the first writ. So if a *capias ad satisfaciendum* be taken out within a year, you may continue it down as long as you please upon a *vicecomes non misit breve*, and not be put to a *scire facias*; so there is a vast difference between the writ to which the defendant has an answer, and one to which he has none; for if it be a writ to which the party has a plea, there must be some sort of a return, or that it came *tardè*, but still there must be some return; and for this he quoted the case of *Sir John Vidian v. Welling* (b); and, can any court hold plea of a writ before it comes back to them? And if you come to set it forth by *sicut alias*, you ought to set it out at large. And he said, he would support it if he could, for the sake of THE SUITORS, who have been at the charge of purchasing the franchise, and not for the sake of THE STEWARD; for they generally oppress the people.

If an *alias scire facias* issue before the first *scire facias* is returned, it is a *discontinuance*.
Post. 124.

1. Salk. 177.
1. Saund. 338.
3. Salk. 231.
Ld. Ray. 21.
706. 716.

Post. 7. 50. 68.
Ld. Ray. 383.
434. 553. 880.
1429.
2. Vern. 695.
Fitzg. 289.
8. Mod. 73. 227.
1. Peetr. Wms.
742.
2. Peetr. Wms.
144.
3. Peetr. Wms.
36.
Stra. 10. 301.
461.

(a) See 1. Roll. 376. Salk. 89. out the writ is the commencement of the
1. Bac. Abr. 41. 4. Hawk. P. C. 124. suit.
3. Burr. 1423. that the day of suing (b)

Easter Term, 1. Queen Anne, In B. R.

An error in process cannot be taken advantage of on a writ of error on a judgment in *scire facias* against the bail.

THE CASE was argued again this Term.

BRODERICK took exceptions :

FIRST, That the original declaration was, that the defendant "*per scriptum suum obligatorium, &c.*" The defendant pleads "*non est factum*;" and a *venire* to try the cause was, "*ad recognoscendum si scriptum obligatorium præd.*" was the deed of the defendant, which he said was a contradiction; and then there being no day on THE ROLL to the party but the day on the *venire*, which is none, the *venire* being contradictory, the confession of *relicta verificatione* is void, and the judgment grounded thereupon erroneous.

HOLT, Chief Justice, answered, Take it to be so, and that it is a plain *discontinuance*, which is the utmost you can pretend, you cannot take advantage of that in an error upon the judgment on the *scire facias* against the bail. If bail be to an action in this court, and a *scire facias* against the bail, and judgment against them by *nihil dicit*, in a writ of error of that judgment they cannot say that there was no judgment in the original action, because that ought to have been pleaded on the *scire facias*; for though it be essentially necessary to charge the bail, there should be judgment against the principal, yet that must be taken advantage of in pleading upon the *scire facias*, and never upon a writ of error.

Vide 1. Vent. 72.

A judicial writ must be returned before an alias can be sued out thereon.

SECONDLY, It was objected, the want of a return of the first *scire facias*; for an entry was made that the officer had not returned it.

Ld. Ray. 1143. 7259.

TO WHICH it was answered by Counsel, that true it is, upon a writ issuing out of chancery returnable in the common pleas or in this court, no proceedings can be until it be returned, for until then it is not depending; otherwise where the writ issues out of the same court and is returnable there (a). And the ancient practice was, that when a writ issued out of this court, an entry was made of it on THE ROLL; and where a man is to lose his inheritance, or incur a penalty, he may appear on the day on THE ROLL, though the officer has not returned the writ.

* [7]
Post. 50. 63.
Ante. 5.

* HOLT, Chief Justice. The ancient way was, to make a record of the original; and in the common pleas they went by way of recital, "*Dominus rex misit breve suum clarum in hæc verba*:" now a *scire facias* is sued out here, and an entry made of "*vice-com. non misit breve*," and sued out and returned, and the party appears; Why shall they not proceed upon this second writ? And though the first be not returned, yet there is an entry of it on the plea-roll, and upon that the other proceedings are founded; and the second refers to it *sicut alias*.

(a) See the Year-Book 2. Edw. 4. pl. 31. 5. Co. 37.

Easter Term, 1. Queen Anne, In B. R.

THE CASE being argued again in *Michaelmas Term*, in the first year of *Queen Anne*,

ATWOOD
against
BURK.

HOLT, *Chief Justice*, declared, that he had spoke to COKE, *Prothonotary of the Common Pleas*, who assured him, he never knew a proceeding upon a second *scire facias*, the first not returned; and he said, that though the defendant had a day in court upon the *scire facias* being entered on THE ROLL at its issuing, yet there can be no proceeding upon it until it be returned, and you should get a return made; no matter whether executed or not (a).

ANOTHER EXCEPTION taken was, that this was a judgment on *demurrer*, and they gave a final judgment without giving an interlocutory one, "*quia videt. Cur. &c.*"

If judgment on a demurrer to a plea be entered, "And therefore it is considered, &c." and not "And because it appears to the Court here, that the plea of the said defendant is insufficient in law, &c." it is erroneous.

And it was said, that the forms of judgments ought to be strictly kept to; and therefore "*concessum*" or "*adjudicatum*" has been held bad in an inferior court. And this is like the case of a special verdict, where the special fact is left to the judgment of the Court (b). It is not enough that judgment be given for him that ought to have it, but it must also be upon a right ground (c).

S. C. 1. Salk. 402.
2. Salk. 603.
5. Mod. 397.

HOLT, *Chief Justice*, said, that such a fault would be amended now; and he said, that always upon *demurrer*, before you proceed to final judgment, you say, "*quia videt. Cur. quod placitum, &c. Ideo consideratum est;*" and here they give final judgment, when, for aught appears, they have not determined the matter submitted to them; and though it be not essential to give a reason for their judgment, yet it is material to decide the matter put in judgment.

[8]

THE COURT seemed inclined to reverse the judgment for these two errors (d).

RAYMOND, for the defendant, perceiving this, took exception to the writ * of error, that it was, "*quod in adjudicatione executionis judicii præd. error intervenit,*" where it should be, "*in adjudicatione executionis recognitionis præd.*"

A writ of error on a *scire facias* against bail is bad, if it be in *adjudicatione executionis judicii* instead of in *adjudicatione executionis super recognitionem*.

And though POWELL, *Justice*, said, that a *recognizance* was a judgment, and wanted nothing but execution to make it a complete judgment;

S. C. 1. Ld. Ray. 328. 553.
S. C. 3. Salk. 369.
S. C. Carth. 449

HOLT, *Chief Justice*, said, yet it was another species of a judgment which ought to be shewed.

(a) It is said, that this case was stirred again in *Hilary Term*, the fourth of *Queen Anne*, and that the first writ, when awarded, should be entered on the roll, for the defendant has a day by the roll; and therefore the writ is depending before the return of it: and therefore in this case, if there had been such an entry, it had been good with this award of

sicut prius, &c. S. C. 2. Ld. Ray. 1252.
(b) 1. Roll. Rep. 305. 309. Cro. Jac. 372. Cro. Eliz. 227.
(c) See Owen, 19.
(d) It is said, S. C. 1. Salk. 402. that the judgment was reversed on this last exception.

Easter Term, 1. Queen Anne, In B. R.

Attworn
against
Burr.

And THE COURT were of opinion to quash the writ of error for this exception (a).

(a) But see 1. Salk. 89. 2. Ld. Ray. 1252.

Case 6.

Anonymous.

A bailiff may break open the door after touching a person against whom he has a warrant through the window of the house. — 6. Mod. 173. 211. 1. Salk. 79. And see the same point adjudged in the king's bench, in Hilary Term, 12. Geo. 2. in the case of the Sheriff of Hampshire v. Godfrey (a).

(a) See also 3. Bl. Com. 283. Foster, 319. 3. Hawk. P. C. ch. 14. f. 9. 2. H. Bl. Rep. 120. and Lee v. Ganfell, Cowp. 1.

Case 7.

Jacob against Dallow.

The ordinary has, of common right, the disposal of seats in a church.

ALIBEL was instituted in the spiritual court for disturbing in a seat in a church.

The defendant below comes for a prohibition, and suggests a prescriptive right in himself.

S. C. 2. Salk.

551.

S. C. 6. Mod.

230.

S. C. 2. Ld.

Ray. 755.

S. C. 12. Mod.

233.

5. Mod. 436.

6. Mod. 338.

And a prohibition was granted and declared on.

And for a consultation; the defendant set up a prescriptive title to himself, and traversed that of the plaintiff; and upon demurrer, a consultation was awarded.

FOR PER CURIAM, The ordinary has of common right the disposal of seats, if there be no temporal right set up against it, as the now plaintiff has done here, viz. his prescription; and that is now traversed (a).

(a) The plaintiff, in his declaration, shewed a prescriptive right to the seat; the defendant pleaded a usage to sit in the seat, and traversed the prescription; and to this plea the plaintiff demurred; and it was contended, that although the plaintiff by his demurrer had admitted the traverse of the prescription, yet that the defendant could not have a consultation, because he had pleaded a usage, which was not triable by the spiritual court. But Holt, Chief Justice, was of opinion,

that as the pleadings admitted the possession of the defendant, the spiritual court has cognisance of the disturbance of such possession, and, no temporal right being infringed, may settle and quiet it according to the usage; and a consultation was accordingly granted by the whole Court. S. C. 2. Ld. Ray. 756. — And see Goodie v. Bishop of London, that there shall be no prohibition until it appears that the prescriptive right is in question. Stra. 879.

Case 8.

Anonymous.

Prohibition lies after sentence, if want of jurisdiction appear.

Post. 137. 148. — Stra. 137.

AFTER SENTENCE in a spiritual court, they will not grant a prohibition, except it appear upon the face of the proceedings to be matter out of their jurisdiction. Quære (a).

(a) See 2. Inst. 602. 2. Burr. 813. Cowp. 424. 3. Term Rep. 552. 2. Term Rep. 473.

Davila

Easter Term, 1. Queen Anne, In B. R.

Davila against Dalmanfer.

Case 9.

A SUBMISSION TO AN ARBITRATION was by rule of court, pursuant to the statute 9. & 10. Will. 3. c. 15.; and after the arbitrators had made some progress in the matter, the party came and snatched away the papers, and so hindered farther proceeding.

An attachment lies for hindering an award.

S. C. 1. Salk. 73.
Ld. Ray. 857.
1. Stra. 695.
2. Stra. 1173.

And by HOLT, Chief Justice, there ought to be an attachment, if the party did not enlarge the rule, and pay costs.

* [9]

* Lumly against Quarry.

Case 10.

TROVER AND CONVERSION FOR A SHIP, which the defendant, as judge of the admiralty court of Pennsylvania, condemned, for want of being registered in England.

A Judge of a foreign court of admiralty shall give bail in trover for a ship condemned by him.

The action was brought in the sheriff's court in London; and being removed by *habeas corpus* to the king's bench,

THE QUESTION WAS, Whether there should be bail as this case stood?

S. C. 1. Salk. 101.
S. C. Holt, 82.
S. C. 2. Ld. Ray. 767.
Stra. 479.
Ld. Ray. 273.
603. 893.

HOLT, Chief Justice, said, that though it was upon a *habeas corpus*, they might enquire into the cause of action, and, if they saw occasion, order special bail; for otherwise inferior courts might be made use of to oppress people, by laying great actions upon them there (a).

And here, PER CURIAM, if the defendant has acted as Judge, and the matter was within his cognizance, his sentence, whether right or wrong, binds until it be reversed; and if it were in the admiralty of France, it would be so; and the only remedy in such case is to appeal.

Sentence of a foreign court of admiralty is conclusive till reversed.

3. Mod. 194. Bull. N. P. 245. 2. Term Rep. 649. 4. Term Rep. 382. and see page 353 to 364.

3. Keb. 785.
Park on Insur.

(a) Bail was ordered to be put in for 500l.; for if the defendant acted as Judge, he will be out of danger of any action; but if he did not act as a Judge, then it is very reasonable that special bail should be put in. S. C. 2. Ld. Ray. 767.

Anonymous.

Case 11.

HOLT, Chief Justice. The writ of *ne exeat regnum* ought not to be granted but upon great reason and examination; otherwise a *homine replegiando* may lie.

A *homine replegiando* lies upon a *ne exeat regnum* improperly

granted.—2. Salk. 581. 702. Ld. Ray. 613. 943. 987. Prec. Chan. 171. 230, 492. Cases T. T. 196. Gilb. Eq. Rep. 149. 1. Peetr. Wms. 263. 3. Peetr. Wms. 313.

The

Case 12.

The Queen against Ewer.

If the condition of a recognizance be, "to give notice to a man and his clerk," and a *scire facias* states it to have been, "to give notice to the man or his clerk," the variance is fatal.

SCIRE FACIAS upon a recognizance entered into before **HOLT, Chief Justice**, conditioned, that one *J. S.* should appear to an indictment against him, and carry it down to trial, according to the statute 7. & 8. *Will.* 3. c. 32. (a).

The defendant demurs to it.

FIRST, There is a variance between the *scire facias* and the recognizance. The recognizance recited is, that upon issue joined, the defendant would give notice of trial to the prosecutor and his clerk; and the true recognizance entered into is to give notice to the prosecutor or his clerk: so there is a variance.

S. C. 2. Salk. 564. S. C. 3. Salk. 369. S. C. 2. Ld. Ray. 756. S. C. Holt, 612. Ld. Ray. 152. 536. 697. 702. 713.

If a *scire facias* recite a recognizance incorrectly, advantage may be taken of the variance without oyer of the writ.

SECONDLY, It is not pursuant to the statute; for it is in a greater sum than the statute requires, which is only twenty pounds each.*

IT WAS URGED, on the other side, that if one would except against a writ, he ought to have oyer of it (b), and that notwithstanding it be set out in *hæc verba*.

6. Mod. 28.
2. Lutw. 1642.
2. Mod. 62.
2. Saund. 9.
5. Co. 74.
Ld. Ray. 347. 392. 970. 1056. 1176.

BUT it was answered, that it were vain to demand oyer of a writ which is already set out in *hæc verba* on THE ROLL. Indeed, it is true, that none can except against an original writ that is not set out in *hæc verba*, * without having oyer of it.

* [10]

A recognizance taken by a Judge of the king's bench upon the removal of an indictment, in more than the sum mentioned in 5. *Will. & Mary*, c. 11. is good.

And **HOLT, Chief Justice**, said, that the recognizance varies from the statute, and therefore cannot be good by the statute; yet it may be good by the common law. It is true, the recognizance, if not according to the statute, cannot make the *certiorari* a *superfedeas*; for by statute no *certiorari* shall be a *superfedeas* without a recognizance of twenty pounds, &c. But before that statute, the Judges of this court had power to take recognizance, which is not taken away by the statute: but only that they shall not be such as will make a *certiorari* a *superfedeas*.

Str. 1165.
Burr. 10.

And the writ was quashed for the first exception.

(a) But see 14. *Geo.* 2. c. 17.

(b) It is said, S. C. Ld. Ray. 756.

that the defendant prayed oyer of the recognizance, and of the condition thereof.

Case 13.

The Queen against The Parish of Milverton.

The sessions cannot make an original order of removal.

UPON AN APPEAL to the sessions, they made an order that the first order should be quashed, and the party sent to the parish from whence he was thereby removed.

S. C. Sett. & Resp. 296. 2. Salk. 472. 5. Mod. 298. Fitzg. 83. 254. Str. 1198.

Easter Term, 1. Queen Anne, In B. R.

IT WAS AGREED, that the justices of the sessions had only power to affirm or quash the former orders, but not to make a new order.

THE QUEEN
against
THE PARISH
OF
MILVERTON,

But because an order may be good in part and void for other part, that part which ordered the poor person to be sent back was quashed, and the rest confirmed,

Anonymous.

Case 14.

HOLT, Chief Justice. A married woman is to be discharged upon common bail of course; but if it be doubtful whether she be married or not, she shall be held to special bail, if the cause require special bail (a).

A *few* *cases*
shall be dis-
charged on com-
mon bail.

6. Mod. 17. 105. 1. Salk. 115. 1. Mod. 8. 1. Lev. 1. 2. Vern. 613. Stra. 1167. 1237. 1272,

(a) See Edwards v. Rourke and his Wife, 1. Term Rep. 486. Pearson v. Meadow, 2. Bl. Rep. 903. Miller, 3. Term Rep. 627. Partridge v. Clarke, 5. Term Rep. 194. Tidd's Practice, 49.

Anonymous.

Case 15.

HOLT, Chief Justice. It is matter indictable to bury a man that dies of a violent death before the coroner's inquest have sat upon him.

Indictable to bur-
ry until after co-
roner's inquest.

3. Hawk. P. C. ch. 9. §. 23. Stra. 22. 167. 533. 1097.

Memorandum.

Case 16.

IT is a rule of court, that no order of justices, whereof an appeal lies, be brought hither by *certiorari* until after appeal; and if any be, that it be sent back by *procedendo*; for the original order does not come up, but the tenor of it, as appears by the very words of the return.

An order of jus-
tices cannot be
removed before
appeal.

1. Keb. 33.
6. Mod. 246.
1. Salk. 145. 247. 2. Salk. 564. 1. Show. 336.

Feltham against Cudworth.

Case 17.

Easter Term, 12. Will. 3. Roll 97.

* [11]

SCIRE FACIAS by an administrator to revive a judgment had by the intestate against the defendant, who pleaded the statute of Composition, 8. & 9. Will. 3. c. 18. (a), of two-thirds in number and value * of the creditors, and a composition for payment of two shillings in the pound; *ita quod* he paid it within five years after he should be discharged out of prison.

Statute of Com-
position of two-
thirds pleaded.

S. C. 3. Salk. 59.
S. C. Comy.
Rep. 112.
S. C. 2. Ld.
Ray. 760.
Post. 16. 96.

THE WHOLE QUESTION, on a demurrer, was, Whether the defendant ought to aver that he had been in gaol?

(a) Repealed by 9. & 10. Will. 3. c. 29.

IT

Easter Term, 1. Queen Anne, In B. R.

FELTHAM
against
CEDWORTH.

IT WAS URGED by the plaintiff, that he ought, and that the plea was ill for want of it; for the intent of the statute was, that there should be an absolute positive composition, either to take less than the debt, or to give a longer day of payment, but not to discharge the whole debt of the creditors by the composition of two-thirds, which would be the case here if the defendant had never been in gaol; for the two shillings in the pound was not payable until five years after the defendant came out of gaol; and that might be never, if he had not been then in gaol; and then the composition might be, that defendant should never pay.

TO WHICH it was answered, that it is in the power of the two-thirds of the creditors, &c. to make a composition general; that a contingent composition is a composition within their power. Besides, it was said, that the matter subsequent to the *ita quod* did not depend upon it as upon a *condition precedent*, but that the *ita quod* was only a limitation; as a grant of a rent, provided it does not touch his person; or a grant without impeachment of waste, *ita quod* he do not commit voluntary waste.

THE COURT, at another day, held it no good composition, because it is such as perhaps the defendant will never be bound to perform, and the *ita quod* makes it a *condition precedent*, that the defendant should be discharged out of gaol; and the statute intended a final absolute agreement, whereby the creditor is bound to receive so much, or to give such time; and if the defendant do not perform such composition, the former debt is thereby revived. Suppose I covenant with J. S. to convey him such lands, *ita quod* he pay me five hundred pounds by such a day, and he does not pay the money by the day, I am not bound to make over to him the estate; for where an *ita quod* is annexed to an agreement for a thing not executed, it qualifies the matter before, and is the same thing as if it were put first; and the act means there should be a complete final agreement, and not one depending on uncertainties. Now *non constat* that the defendant ever was in prison, and therefore, for aught appears, the condition precedent never happened, nor is like to happen; and we cannot intend he was imprisoned.

* [12] * And PER OMNES, All compositions by virtue of this act work by way of defeazance, which if not performed the original debt arises.

Judgment for the plaintiff.

Case 18.

Anonymous.

Toll incident to a market. BY HOLT, Chief Justice. A toll is not of common right incident to a market.

2. Show. 34. 1. Salk. 327. 4. Mod. 319. 2. Bac. Abr. 459. 3. Bac. Abt. 49. 3. Burr. 1404. Cowp. 47. 1. Term Rep. 667. 6. Com. Dig. "Toll" (C).

Anonymous.

Easter Term, 1. Queen Anne, In B. R.

Anonymous.

Cafe 19.

HOLT, Chief Justice. It has been held, that an *indebitatus Assumpsit* would lie for a customary fine of a copyholder; but, he said, he never could be reconciled to that opinion (a).

1. Show. 157.

(a) It is now determined, that a general *indebitatus assumpsit* will lie for tolls, *Steward v. Baker*, 1. Term Rep. 616.; *Tremlet*, 2. Will. 95.; and for a copyhold fine, *Grant v. Astle*, Dougl. 695.—See also *Evelyn v. Chichester*, 3. Burr. 1717. for petit customs, *Mayor of Exeter v.*

Anonymous.

Cafe 20.

HOLT, Chief Justice. Without a particular usage, the mayor of a corporation has not a casting voice.

Mayor.
Ld. Ray. 1236,
1030.

Green against Rivet.

Cafe 21.

Michaelmas Term, 13. Will. 3. Roll 316.

IN AN ASSUMPSIT, "*non assumpsit infra sex annos*" was pleaded.

A bill of *Middlesex* pleaded as returnable "on Monday next" after three weeks of All Saints, is no bar to the statute of Limitations.

The plaintiff replied, that for the recovery of the said debt he sued out a bill of *Middlesex*, which he recited in his replication, and it appeared to bear teste, "*die Lunæ post tres septimanas Sancti Michaelis, anno quinto, ita quod parat. habeat* the defendant's body *die Lunæ post tres septimanas Sancti Michaelis*," generally, without telling when, and that the defendant promised within six years before the issuing thereof.

S. C. 1. Salk.

The defendant rejoined, that he did not promise within six years before the issuing thereof.

421.

The plaintiff demurred.

S. C. 2. Ld.

The exception was to the replication, viz. that it did not appear when the writ was returnable; for it could not be intended to be immediate, without it had been so said expressly; and in fact a bill of *Middlesex* is never returnable immediate; and it is true, the writ itself never mentions the year in which it is returnable; but when one pleads a writ, he ought to do it.

Ray. 772.

Ante, 5.

1. Saund. 36.

120. 127.

Camb. 70.

1. Show. 354.

2. Show. 79.

126.

3. Salk. 227.

Ld. Ray. 383.

434. 553. 880.

883. 1429. 1441.

2. Vern. 695.

Stra. 550. 719.

Bull. N. P. 151.

2. BL Rep. 1131.

HOLT, Chief Justice, said, that the statute of Limitations was one of the best of statutes, and the pleading thereof no discouragement to anybody.

The defendant had judgment *nisi*.

Sir George Tuke's Cafe.

Cafe 22.

ASSUMPSIT. The plaintiff declared, that he was possessed of a note of the defendant's, by which the defendant promised to pay him so much money; that the defendant, in consideration the a note, and that in consideration thereof he promised to pay, &c. is good.—S. C. 2. Ld. Ray. 358. 368. 663. 742. 753. 759. Fitzg. 302. Comy. 98. Stra. 94. 406. 592. 648. 653. 723. 933. 1027.

A declaration in *assumpsit*, that the plaintiff delivered the defendant

plaintiff

Easter Term, i. Queen Anne, In B. R.

SIR GEORGE plaintiff would deliver him the said note, promised to pay him the money; that he thereupon delivered him the note; and verdict.

* [13] IT WAS MOVED *in arrest of judgment*, that here was no consideration; for it did not appear what the * consideration of the note was; and if the note were without consideration, the delivery of it up cannot be one (a).

BUT PER CURIAM, The delivery of the note being said indefinitely, it shall be intended a delivery for ever; and though a note for the payment of money does not carry a consideration in itself, yet it is evidence of a debt, and by consequence a means whereby he may recover his money (b); and the parting therewith is a consideration, and the defendant has admitted it to be upon consideration, by demanding it to be delivered. And if the case had been, that this had been the note of J. S. for payment of money to J. N. and J. D. in consideration that J. N. would deliver the note to him had promised to pay him, it had been a good consideration; for it is not necessary that the matter of the consideration should be of advantage to the defendant, so it be any trouble or disadvantage to the plaintiff.

Judgment was given for the plaintiff.

(a) See Palmer, 171. Saund. 136. in the same manner as on inland bills of

(b) By 3. & 4. Ann, c. 9. actions may exchange.
now be maintained on promissory notes

Case 23.

Anonymous.

Satisfaction acknowledged of a judgment.
Ante, 2.
Post. 93.

A TAKES a judgment in the name of B. who dies, and administration is committed to another. A. enters satisfaction on the judgment: the administrator of B. moves, that the entry of satisfaction be vacated.

* And this appearing on a report of THE MASTER to whom it was referred,

THE COURT said, that the defendant had good equity, but they could not help him.

And the rule was to vacate the entry of the judgment nisi.

E A S T E R T E R M,

The First of Queen Anne,

I N

The Common Pleas.

Sir Thomas Trevor, *Knt. Chief Justice.*

Sir John Blencowe, *Knt.*

Sir John Powell, *Knt.*

Sir Edward Nevil, *Knt.*

} *Justices.*

Edward Northey, *Esq. Attorney General.*

Simon Harcourt, *Esq. Solicitor General.*

Prideaux against Morrice.

Case 24.

Trinity Term, 12. Will. 3. Roll 655.

IT was an action on the case in the common pleas against the defendant *Morrice*, being one of THE VIANDERS of the town of , in *Cornwall*, for not returning the plaintiff, he being duly elected a *member of parliament* for that borough, but instead thereof falsely and maliciously returning *J. S.* who was not duly chosen.

An action on the case at common law will not lie against a returning-officer for falsely returning a candidate for a seat in parliament; but an action lies on 7. & 8. Will. 3. c. 7.

Upon a special verdict finding all the declaration, and farther, that the right had not been determined in THE HOUSE OF COMMONS; and that there was another VIANDER still living;

THE COURT, after several arguments, delivered their opinions by TREVOR, *Chief Justice*, BLENCOW, POWELL, and NEVILL, *Justices*.—We are all of opinion, that the defendant ought to have judgment.

* [14]

* FIRST, We do not give our opinions how it would be if the matter had received a determination in THE HOUSE OF COMMONS in favour of the plaintiff.

S. C. 1. Lutw. 82.
S. C. N. Lunn, 31.
S. C. 2. Salk. 502.
S. C. Holt, 523.
S. C. 8. St. Tr. 9.

1. Mod. 145. 6. Mod. 45. 5. Mod. 312. 3. Lev. 29. 1. Vent. 206. 2. Vent. 50. 1. Will. 127. Ld. Ray. 907. 938. 951. 1105.

SECONDLY,

Easter Term, 1. Queen Anne, In C. B.

PRINCEAU
against
MORRICK.

SECONDLY, We give no opinion how the action ought to be conceived; whether it ought to be against both *the vianders*, or whether it might be against one of them; because our opinions are, that it does not lie against them anyway.

So that our first reason is, for that the judging of the right of election belongs to the parliament, that is, to THE HOUSE OF COMMONS; and that is the proper jurisdiction for determining such matters; and therefore it would be very absurd and inconvenient if it should be tried by a jury or court of *Westminster-Hall*, in an action on the case; for that would produce a different determination of the same matter by two independent jurisdictions; one might have judgment and damages against him in *Westminster-Hall*, for a matter in which he might have done his duty by a vote of THE HOUSE OF COMMONS; and of which THE COMMONS are the sole judges (a). It is objected, that this inconvenience of clashing jurisdictions would ensue in cases where the act of parliament gives the action, and a particular penalty; and yet none will say but the action will lie notwithstanding, even before any determination of the matter in parliament. But the answer to that objection is, that where the parliament gives the courts of *Westminster-Hall* a jurisdiction, let the inconvenience be what it will, we may exercise the jurisdiction; but it cannot be said, because the parliament has given us a jurisdiction in particular instances, that by the same reason it has given it to us in all cases: and the argument is, to say, because the parliament has given us a remedy, therefore it lay at common law, when the contrary inference is much more natural; and if the parliament had intended to give a remedy, it would have given an action on the case; for that had been the most adequate remedy, and would suit everybody's case. And the statute 23. Hen. 6. c. 14. that gives a penalty in some cases, takes notice, that before that statute there was not sufficient remedy. It is also objected, * that it is not inconvenient that there should be concurrent jurisdictions; for the queen's bench, the court of common pleas, and the court of exchequer, are so. It is true; but that works no inconvenience to the subject; for if the suit be commenced in one court, and after in another, that court which has first possession of the cause shall determine it; and it is a good plea in abatement for a defendant to say, that there is an action depending in another court for the same cause; and a judgment in one court is pleadable in bar to an action for the same cause in another: but that will not be so in the present case. As to the case of the *Earl of Banbury*, where the court of queen's bench did determine the right of peerage, the answer is, that cause is not a precedent to be followed, for the consequence of it is a failure of justice to this day; so that that case is a strong instance of the mischief that we would now

1. Salk. 572.
Id. Ray. 18.
859. 1247.

(a) But see the opinion of WILLES, Chief Justice, on this subject, in the case of Wynne v. Middleton, 1. Will. 127, 128. and 10. Geo. 3. c. 16.

avoid.

Easter Term, 1. Queen Anne, In C. B.

avoid. Another argument against it is that of *Littleton* upon the *Statute of Merton*, a *non usitate*, the mischief has always been, as appears by the acts of parliament giving remedy therein, as may be seen by the statutes of *Henry the Fourth* and *Henry the Sixth*. Another argument against it is, that the right of a third person would be tried here between strangers: so it would be determining his right by a side-wind (a).

PRIDEAUX
against
MORRICE,

(a) And judgment was given accordingly for the defendant, S. C. N. Lutw. 31. And a *twist of error* was brought in the court of king's bench, and the judg-

ment affirmed, S. C. 2. Salk. 502.—But see *Norris v. Mauduit*, 5. Mod. 311. and *Sir W. W. Wynne v. Middleton*, 1. Will. 127.

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EASTER TERM,

The First of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Edward Northey, Esq. Attorney General.

Simon Harcourt, Esq. Solicitor General.

Carlile against Greenwood.

Case 25.

A SCIRE FACIAS was brought on a judgment in the queen's bench at *Westminster*; and the administrator produced letters of administration granted by the *Archbishop of York*.

And because the judgment was affixed at *Westminster*, in the province of *Canterbury*, the administration in the province of *York* did not extend to it.

An administration in the province of *York* will not support an action, the cause of which arises in the province of *Canterbury*.

S. C. 6. Mod. 134.

Lylly's Case.

Case 26.

COVENANT lies not against an apprentice being an infant (a). Apprentice.

S. C. Com. Rep. 38. 3. Mod. 191. 1. Vern. 328. 2. Vern. 492. 518. Stra. 604. 1. Ter. Rep. 159.

(a) See *Whitley v. Loftus*, 8. Mod. Branch v. *Ewington*, Dougl. 519.
190. *Gilbert v. Fletcher*, Cro. Car. *Trueman v. Hurst*, 1. Term Rep. 40.
179. *Horn v. Chandler*, 1. Mod. 271.

* [16]

* *Beverly against Pim.*

Case 27.

AN ACTION ON THE CASE upon several promises; to which the statute of Composition of two-thirds was pleaded in bar. But the plaintiff shewed the contract to have been made since the

Traverse.

Ante, 10.

Post, 96.

C. 2

time

Easter Term, 1. Queen Anne, In B. R.

BEVERLY
against
Piss.

time of the statute, which the defendant did not traverse in his plea; as he ought to have done; for if you vary from the time in the declaration, and make such variance material, you ought to traverse the time in the declaration.

Judgment was given for the plaintiff *nisi*.

Case 28.

The Queen against Clerk.

A coroner's in-
quest is traver-
sable,

AN INQUISITION taken before the coroner *super visum corporis* of one who had killed himself.

PER TOTAM CURIAM. Such inquisition is traversable (a).

Quere, If a co-
roner's inquisi-
tion of *felo de se*
is good, without
the word "*mur-*
"*der*."

But exception was taken, that it wanted the word "*murdravit*;" for it was, that the party "*Deum præ oculis non habens, solus existens in domo sua mansionali voluntarie felonice et ut felo de se, cum cultro pretii, &c. quem in manu sua dextra tenuit, jugulum suum secuit et seipsum occidit.*"

S. C. Salk. 377.
S. C. Holt, 167.
1. Salk. 190.
2. Lev. 140.

It was answered, that the word "*murdravit*" is not necessary in such an inquisition as this, though it be otherwise in an indictment of murder of another person, because there are degrees in the offence of killing another, as manslaughter, murder, which ought to be expressed in words, but in the offence of killing one's self there can be no such degrees. In the case of *Rex v. Parker* (b), TWISDEN, Justice, held, that the word "*murdravit*" is not necessary in such an inquisition, though there was an opinion to the contrary in the case of *Rex v. Alderman* (c). 2. Lev. King v. Parker.

HOLT, Chief Justice, said, If it was not for the authority of *Alderman's Case*, in my LORD HALE's time, he would think it not necessary in the case of *felo de se*; for he said, the reason why "*murdravit*" is necessary in an indictment of murder (d) is, because clergy does not lie in murder (e).

A coroner's in-
quisition omit-
ting to state that
the deceased
died of the wound
is void.

HOLT, Chief Justice. But most surely a great defect in this inquisition is, that it is not said he died of the wound set forth in the inquisition; for to what purpose has the queen a view of the dead body but to shew the jury that the wound is mortal.

Ante, 10.

4. Co. 44.
3. Mod. 308.
3. Hawk. P. C.
ch. 23. f. 82.

And, PER TOTAM CURIAM, for this fault the inquisition was quashed; for it is not enough to say that it was *felonice*, but also it ought to be shewn how it was *felonice*.

(a) See 3. Hawk. P. C. ch. 9. f. 55.
Rex v. Roupel, Cowp. 458. and Rex v.
Heaton, 2. Term Rep. 134.

(b) 1. Keb. 66.

(c) 3. Keb. 604.

(d) See Dyer, 304. 1. Hale, 450.

(e) 3. Hawk. P. C. ch. 23. f. 77.

4. Hawk. P. C. ch. 25. f. 55. 4. Mod. 61.

Memorandum.

• Memorandum.

Case 29.

NOTE, *Midsummer-Day* was on *Wednesday* this year, and if *Trinity Term* that had not been *Wednesday* had been the last day of *Trinity* cannot end on *Midsummer-Day*, but now it was on *Thursday*.

For by **HOLT**, *Chief Justice*, *Trinity Term* may begin on *Midsummer-Day*, but cannot end on it; there can be no return this year in *tres septiman. Trin.* but it must be *die Jovis post tres septiman. Trin.*

6. Mod. 81. 148.
196. 251.
Ld. Ray. 4. 639.
1528. 1557.

And this, he said, had not happened in one hundred years before;

Adam's Case.

Case 30.

ACAPIAS IN WITHERNAM was *tested* the first day of *May*, *Witernam* *superfeded*.
and returnable *die Jovis post tres Trinitatis*.

THE COURT ordered the attorney and filazer to attend; for they looked upon it to be a great oppression to make such a long return in order to deprive one of his liberty so long.

1. Show. 221.
226.
Ray. 474.
Ld. Raym. 775.

And here he gave bail *body for body* to appear at the return of the writ; and the *witernam* was *superfeded*.

Anonymous.

Case 31.

AN INFORMATION was filed against **THE PLAYHOUSE** for acting profane and lewd plays; and they being bound by recognizance to try it, made up the record wrong, *viz.* "*Lincoln's-Fields*" for "*Lincoln's-Inn-Fields*," thinking to be acquitted upon that *variance*.

Playhouse prosecuted.
1. Mod. 76.
5. Mod. 142.
Comb. 304.

But **HOLT**, *Chief Justice*, ordered it to be found specially.

MR. ATTORNEY moved to have their recognizance *estreated*.

Anonymous.

Case 32.

SIR RICHARD NEWDIGATE was bound by his recognizance for a twelvemonth to keep the peace against his daughter, and for his appearance the first day of next Term.

Recognizance of the peace against the father.

And **THE COURT** said, they could not dispense with his attendance, as they could if it were *de die in diem*, but here he was bound by the condition of his recognizance.

3. Peer. Wms. 103.
Stra. 1207.
2. Hawk. P. C. ch. 60. l. 17.

TRINITY TERM,

The First of Queen Anne,

I N

The Queen's Bench,

1702.

Sir John Holt, Knt. Chief Justice.

Sir John Powell, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Edward Northey, Esq. Attorney General.

Simon Harcourt, Esq. Solicitor General.

* *Machil against Clerk.*

Easter Term, 12. Will. 3. Roll 342.

* [18]

Cafe 33.

ERROR in this court, on a judgment given in the court of common pleas, where the question, upon a special verdict in ejectment, was this:

A tenant in tail, in consideration of the marriage of his son, covenants to stand seised to the use of himself for life, remainder to the use of his son and heir, and the heirs-male of his body by his intended wife, with several remainders over; and after he suffers a recovery, in which he himself is tenant to the *præcipe*, and vouches over the *common vouchee*; which recovery was to other uses than those mentioned by the covenant.

If a tenant in tail covenant to stand seised of the estate tail to the use of himself for life, with remainder to the use of his son in tail, and afterwards suffer a common recovery, in which he is tenant to

the *præcipe*, with single voucher to other uses than those in the covenant to stand seised, the recovery is good, and bars the issue in tail; for the covenant to stand seised made no alteration in the estate-tail, but conveys a *base fee*, defeasible only by the entry of the issue in tail.—S. C. Holt, 615. S. C. 2. Salk. 619. S. C. Com. Rep. 119. S. C. 2. Ld. Ray. 778. S. C. 11. Mod. 19. 2. Jones, 105. 2. Lev. 75. 213. 225. 1. Mod. 98. 121. 159. 2. Mod. 207. 1. Vent. 372. 2. Vent. 260. 318. Ld. Ray. 155. 289. Gilb. E. R. 17. 3. Peetr. Wms. 206. Wilson on Rec. 247. Wright's Tenures, 186.

Trinity Term, 1. Queen Anne, In B. R.

MACNTE
against
CLERK.

SO THE QUESTION was, Whether the tenant in tail, notwithstanding the covenant to stand seised, continued seised in tail, for then the recovery was good, otherwise it could not be good in this case, he coming in as tenant to the *præcipe*.

WILLIAMS here argued, that the covenant was void.—Estate-tail owe their being to the statute *De Donis*, which is the only law that restrains conveyances of them at this day; and the care of that statute regards only the issue and those in reversion or remainder, and does in no way extend to the party himself during his life: and in favour of solemn conveyances, the issue himself, and those in reversion and remainder, are put to their action in case of feoffments and fines by a tenant in tail, and in all cases the tenant himself is bound by his alienation or conveyance as well since as before the statute. Until the statute 27. Hen. 8. c. 10. no legal estate passed by the conveyance of a covenant to stand seised, which was but only a use; but now by that statute, the use draws the possession to it; and then, by this conveyance, the tenant in tail is seised to his own use for life, the remainder to J. Machil his son in tail; which conveyance the tenant in * tail cannot avoid in his own life: and then it follows, that he only has an estate for life with remainders over; so that the suffering of a recovery is a forfeiture of his estate. The covenant to stand seised, by the rule of grants, shall be taken most strongly against him, and most advantageously for those who are to take by it; and the rather, for that here the uses are to him for whose benefit the statute *De Donis* was made, viz. the eldest son, that is, the heir apparent. It is objected, that this being by way of covenant to stand seised, nothing passes but what may lawfully pass as in the case of a grant; and then it will make no alteration of the estate-tail. But I answer, that it is true a covenant to stand seised does not work a discontinuance, yet all the estate may be as much divested out of the tenant in tail himself as if there were a discontinuance, and the covenant will not pass away the remainder limited over, but it will pass a base fee, or put the estate-tail in abeyance. Suppose he had covenanted to stand seised to the use of his son immediately, or to the use of a third person immediately, with remainders over, would not that put the estate-tail in abeyance, or pass a base fee? And how does this case differ from that? A covenant to stand seised operates like a bargain and sale, that is, by way of use; both enure by way of grant, and receive their virtue from the statute of Uses; and all the difference is, that the statute of Henry the Eighth ordains, that no estate of freehold shall pass by the statute of Uses, in case of bargain and sale, until inrollment, but that is only a condition *sine qua non*; and it is the statute 27. Hen. 8. c. 10. that both raises the use and creates the estate; then if tenant in tail bargain and sell his estate to a man and his heirs, a base fee will pass (a). And though Littleton says (b), that if tenant in tail grant *totum statum suum*, the grantee has but an estate for life of the tenant in tail, yet that must be

N. Lut. 241.
Comb. 128.
2. Salk. 679.
3. Salk. 307.

* [19]

(a) Plowden, 557. 3. Co. 84. Cro. Car. 489.

(b) Co. Lit. 331.

meant,

meant, that he has but an absolute indefeasible estate only during his life, but still during his life he has a base fee; and the issue, after the death of the tenant in tail, may bring a *formedon* against the grantee, which shews the estate was not absolutely determined by his death (a). If tenant in tail bargain and sell to another and his heirs, and afterwards levy a fine to A. and his heirs, to the use * of A. and his heirs, the bargainee now has an estate to him and his heirs, during the continuance of the estate-tail, which the fine to the use of another could not give if he had it not before. Some hold, that by the bargain and sale of the tenant in tail to a man and his heirs, he only has a descendible freehold, and the estate-tail is in abeyance (b). And after such bargain by tenant in tail to another and his heirs, the tenant in tail has no reversion or remainder in him; and he cannot punish waste, or enter for a forfeiture; and therefore all the right of the estate will be out of him, and by consequence in abeyance: and here if the right of entail be in abeyance, it will do as well for my purpose; for if it be out of him at the time of the single voucher, it will be a void recovery. If tenant in tail covenant to stand seised to the use of one for years, remainder to the use of his first son in tail, this puts the estate-tail in abeyance. So if he covenant to stand seised to the use of A. for the life of B. and after to the use of C. this puts the estate-tail in abeyance: and it is no answer to say, that where tenant in tail covenants to stand seised for years, or for life of another, still there remains something more in him which he may grant over; for the estate for years, or for the life of the other, may determine during the life of the tenant in tail, and then the remainder over may possibly take: but where he covenants to stand seised for his own life, he has done what he can lawfully do; and any covenant over is what he cannot lawfully do, and therefore it is of no force; for where tenant in tail covenants to stand seised to the use of another, during his own life, still there remains something in him in respect whereof he can punish waste and enter for a forfeiture. And why cannot he grant this interest out of himself by way of remainder, as well as grant it out of himself in another manner, where he grants *totum statum suum*, in which case the estate-tail is so entirely out of him, that he cannot punish waste or enter for forfeiture? A tenant in tail grants his estate to A. and his heirs during the life of the tenant in tail, remainder to B. and his heirs during his life; both A. and B. by possibility may take, though the estates have the same limitation, viz. the life of the tenant in tail: and this is like the common case in settlements, where an estate is limited to husband for life, remainder to trustees and their heirs for the life of the husband, for supporting and * preserving contingent remainders; and if this last case be law, it proves that a tenant in tail has something in him after giving away an estate for his own life; and if he has any such thing in him, he may grant it out of him. In *Littleton* it is said,

M. 1. 1.
C. 1. 1.

[20]

1. Peer. Wm.
316.
3. Peer. Wm.
305. 374.

[21]

(a) 10. Co. 93.

(b) Co. Lit. 331.

that

Trinity Term, 1. Queen Anne, In B. R.

MACHIL
against
CLEAR.

that (a) where tenant in tail grants *totum statum suum*, he has not only granted all his estate for life, but also all his right to the entail out of himself; and if he could do so, he has done it here; and then the recovery after, with single voucher, cannot be good. A tenant in tail covenants (b) to stand seised to the use of himself for life, remainder to the use of his eldest son, no use arises to the son if not during the life of the father only. He owned that the case of *Blythman* (c) was in part against him,

COWPER *contra*. And he agreed, that if the estate-tail was altered by the covenant, the recovery was void; otherwise not; and for authority for him he quoted *Bedingsfield's Case* (d), the case of *Carey v. Dancey* (e), the case of *Alton Woods* (f), an *Anonymous Case* (g), in Trinity Term, in the third year of Queen Elizabeth, the case of *Freshwater v. Rois* (h), *Wiseman's Case* (i), and the case of *Hix v. Goats* (k). And as to *Littleton's Case* (l), that if a tenant in tail grant *totum statum suum*, the entail is *in abeyance*, he quoted *Plowden* (m), where the whole Court is to the contrary; and he said, that no ancient authority did agree therewith. Besides, though it be allowed to be law, there is a great difference between a covenant by a tenant in tail to stand seised, and a grant of *totum statum* of him: First, the covenant is to stand seised of the estate that he has to use, and that is an estate-tail; and one cannot be seised of an estate-tail to use (n). So that when a tenant in tail covenants to stand seised of his estate, it cannot be his estate-tail; then it must be only of the estate he lawfully can be seised of, and that is for his life only; and it will be void as to the estate-tail.

HOLT, Chief Justice. How do you distinguish a bargain and sale by tenant in tail to a man and his heirs from a covenant to stand seised to the use of him and his heirs? Both conveyances raise a use without transmutation of possession. What estate shall a bargainee in fee of tenant in tail have? You say, an estate for life only. If so, upon the death of the issue in tail, the estate of the bargainee determines; and yet that is not so until the entry of the issue in tail; and * this does in no wise contradict the statute *De Donis*, for the donee in tail grants the whole estate out of him, but the issue after his death may determine it; and he relied on *Seymour's Case* (o); for in that case, if it were determined by the death of the tenant in tail, the fine would be a *discontinuance*, whereas it

(a) Co. Lit. 331. a.

(b) Hetley, 110.

(c) 1. And. 291. Cro. Eliz. 279.— See S. C. Yelv. 51. S. C. 1. Brownl. 193.; and that marriage is a good consideration to raise a use, see Cro. Jac. 168. 2. Roll Abr. 784.

(d) Cro. Eliz. 895.

(e) Cro. Eliz. 471*.

(f) 2. Co. 52.

(g) Moor, 32. pl. 105.

(h) Moor, 683. pl. 940. S. C. Yelv. 51.

(i) 1. And. 160.

(j) 1. Roll. Rep. 257.

(l) Co. Lit. feft. 613.—And see *Sheffield v. Ratcliffe*, Hob. 338. and *Tyrell v. Mead*, 3. Burr. 1703.

(m) Plowd. 561.

(n) See 2. Roll. Abr. 780. Cro. Car. 401. Co. Lit. 19.

(o) Moor, 874. 10. Co. 95.

Trinity Term, 1. Queen Anne, In B. R.

secured by way of confirmation of the base fee that passed by the fine; and the only difference is, that it was a defeasible fee before the fine, and by the fine becomes an indefeasible fee. And if tenant in tail make a feoffment, and after levy a fine, that fine binds the right of the entail, though the feoffor had it not in him at that time. It is true, a tenant in tail cannot be indefeasibly seised to a use, and none can give an estate-tail to a use, but the use will be void: and where *Littleton* puts his case of *totum statum suum*, he is to be intended where it is granted by him to another and his heirs, for otherwise it would not put the estate-tail in abeyance; and such a grant without livery would make a *discontinuance*, and is a base fee, whereby the issue is put to his entry (a). In the case of *Stone v. Newman* (b), tenant in tail, reversion to the king, commits treason; the question was, How the king should have the estate by the statute of 26. Hen. 8. c. 13, or by the determination of the estate-tail. But the case of a *covenant to stand seised* may differ from that of *bargain and sale*; for the right of the estate-tail is conveyed away in the case of *bargain and sale*, but in the case of *covenant to stand seised* to his own use for life he is so already; and he cannot bind his heir without making an alteration of the estate-tail. If this had been a remainder to somebody more remote than the heir, it would be more questionable.

At another day, THE WHOLE COURT delivered their opinion, by HOLT, Chief Justice, that the recovery, notwithstanding the *covenant to stand seised*, was good.

THE CHIEF JUSTICE said, It would be reasonably expected from them to give the reasons of this their opinion; for though there were several authorities express in the point, yet the reasons of these judgments were not so obvious; for it has been a question, Whether, if a tenant in tail, by bargain and sale, lease and release, or covenant to stand seised, convey the lands whereof he is seised in tail to another and his heirs, the estate so conveyed does actually determine (as *Littleton* seems to hold) upon the death of the tenant in * tail, or does continue until entry of the issue in tail? And WE HOLD, that notwithstanding the covenant has not that operation here, yet if a tenant in tail bargain and sell, lease and release, or covenant to stand seised to the use of one of his blood in fee, that such bargainee, &c. has a base fee, not determined by the death of tenant in tail, but continuing in the bargainee or releasee, &c. until the issue in tail make an actual entry. This indeed seems to differ from the opinion we now give, but we will by-and-by distinguish.

And it will be worth while to know and consider the reason hereof, because it seems to contradict *Littleton*.

The FIRST REASON then is, because the tenant in tail himself has an estate of inheritance in him. It is not denied, that he

(a) See *Walsingham's Case*, Plowd. 561.

(b) Cro. Car. 427.

had

MAKIE
against
CLEARK

*Went
against
Donis.*

had it before the statute *De Donis*, and it was called a *conditional fee*; and the statute *De Donis* does not make any alteration of the estate, so as to make it not an inheritance, but only fixes it so that there shall not be an alienation of it to the disinheritation of the issue in tail, yet so as a base fee may be made of it (a). If lands be given to a villein in tail, and the lord enters, he has a base fee, that is, to him and his heirs, while the villein has heirs of the entail; so that the tenant in tail has an inheritance in him which may be turned into a base fee; then when he bargains and sells, leases and releases, &c. this inheritance to another and his heirs, it is but reasonable it should pass a base fee, especially if nothing in the statute be against it.

SECONDLY, The tenant in tail has the whole estate-tail in him, and why should not he that has the whole estate, by bargain and sale, lease and release, or covenant to stand seised, divest himself of the whole, and put it in the bargainee? for the power of disposing is an incident inseparable to his estate.

THIRDLY, The turning of the estate-tail into a base fee is not at all contradictory to the statute *De Donis*, nor any branch of it; that statute has very strong words to hinder an alienation to the prejudice of the issue in tail: "*Non habeant illi quibus tenementum sic datum fuerit sub conditione potestatem alienandi tenementum sic datum, quo minus ad exitum illorum quibus tenementum sic fuerit datum remaneat post illorum obitum, vel ad donatorem, &c. reverteretur.*" These words are very strong, * yet we know the construction that has been made upon them. If a tenant in tail make a feoffment or levy a fine, it is so far a prejudice to the issue that he shall be put to his action; and his entry is taken away; and he has no remedy but by a *formedon in descender*; and yet such fine or feoffment was never taken as a breach of the statute *De Donis*: sure then it shall be no breach of the statute to have him put to his entry to recover the estate. Since then it is his inheritance, and all in him, and that a power of alienation is incident to his property that he has, and that an alienation made by him to put the issue to entry is no breach of the statute *De Donis*, I do from hence infer, that such estate by bargain and sale, &c. made by him to one and his heirs, is not actually determined by his death. Now as for authorities in the case, *Seymour's Case* is in point (b). Tenant in tail bargains and sells to B. and his heirs; and the Court held, that the bargainee had a descendible estate, whereof his wife was dowerable, and that by the bare bargain and sale; and though there was a fine after, which barred the issue, that only excluded the issue in tail, but not enlarged the estate of the bargainee; for if he had not a fee before, the fine after could not have given it to him, for it did not work by way of enlargement of an estate.

* [24]

(a) Of base fees, see Co. Lit. 13. 2. (b) 10. Co. 95.
See also 1. Atk. 2.

Trinity Term, i. Queen Anne, In B. R.

He quoted the *Case of Fines* (a), where it is said, that *Littleton's* words (b) are not to be taken strictly and literally : and he said, it was very true that a *bargain and sale* by a tenant in tail to one and his heirs does not work a *discontinuance* ; but yet the estate passing by it does not determine till entry of the issue. And where *Littleton* says, that he cannot dispose of more than for his life, that is, he cannot rightfully do it, so as to bar his issue, but he may convey the estate that shall continue longer, if his issue will not avoid it ; and the *Case of Fines* says besides, that if tenant in tail be of a rent or advowson, and he grant all his estate in the rent or advowson to one and his heirs, though he dies, the rent or estate in the advowson is not thereby determined, but at the election of the issue in tail ; for if the alienation be with warranty, and the issue bring *formedon*, and the alienee plead warranty with assets in bar, he shall be barred by reason thereof ; so that until act be done by the issue in tail to determine it, the alienation continues : if it be of rent, and he bring *formedon*, collateral warranty shall bar him. Tenant in tail bargains and sells (c) * an advowson to another and his heirs ; and the question was, Whether he was remitted ? It was not a doubt but a fee-simple passed by the *bargain and sale* ; indeed *Hobart* held, that the issue was remitted, but the other two held he was not : and if the *bargain and sale* had been determined by the death of the issue, there could not have been a question of the remitter ; and that plainly shews, that the estate which passed by the *bargain and sale* had existence after the death of the tenant, though it were an advowson. But this is no great question, if you consider the common case of lease for years made by tenant in tail, not warranted by the statute of 32. Hen. 8. c. 28. ; such lease is not void by the death of tenant in tail, the issue must enter to avoid it ; for if he do not do so, but accepts the rent, he is bound by the lease, which shews it was not determined by the death of the tenant in tail ; for if it were, no subsequent acceptance of the rent would have helped it.

MACHIN
against
Clerk.

* [25]

Another instance comes home to the case in question, and that is the case of an *exchange* ; the estates must be equal ; you cannot give an *estate for life* in exchange for an *estate in fee* ; you may indeed give an estate for life in exchange for another estate for life ; an estate in fee for an estate in fee ; that is, each party taking must take an estate of equal extent. If one give an estate-tail, and take a fee, it is bad. If tenant in tail and tenant in fee make an exchange, they both have fee-simple without more ado (d) ; for in case of exchange there needs no livery, but only a reciprocal execution by both parties, and this is notwithstanding a good exchange, and a fee-simple passes from the tenant in tail, and shall continue until avoided by the issue (e) ; and here he is not put to his action to avoid it, because here being no livery there was no *discontinuance* (f). Then the exchange must have this effect,

Exchange of
estates.

(a) 3. Co. 84.

(d) Co. Lit. 51.

(b) Litt. sect. 612.

(e)

(c) Winch's Rep. 5.

(f) Co. Lit. 332.

that

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Blanch
against
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• [26]

that it passes a *base fee* until avoided by his issue : and if the issue will not agree to it, he may waive the land in fee conveyed to him, and enter into the other ; but if he do not do so, but continue in the land given, the exchange stands good during his life ; and after his death his issue may avoid it by entering, and so on *toties quoties*. It therefore follows, that a *base fee* does pass, otherwise it could not be a good exchange ; if so, then there is the same reason, that when tenant in tail *bargains and sells, or leases and releases, or covenants to stand seised* to uses in fee, such conveyances should pass a *base fee* ; which * should continue until determined by the act of the issue in tail.

But to consider the case in question :

Notwithstanding this be so, that the bargainee, releasee, or *cestui que use*, of a covenant to stand seised, &c. has a *base fee*, how happens it here, that the covenant to stand seised, in the case in question, does not alter the estate-tail, but that it still continues ? The reason is ; because that though the tenant in tail may make a conveyance of the estate in his life, which shall be good and binding of the estate-tail until avoided by the issue, yet any conveyance he makes to commence after his death shall be void, if by possibility it may not take effect during his life ; and the estate by this covenant is to commence from and after the death of the tenant in tail ; and the instance before put of the lease for years is apposite to this purpose. If a tenant in tail make a lease for years, not warranted by the statute, to commence immediately, or which may possibly commence during his life, such lease is voidable only upon his death ; but if he make a lease to commence from and after his death, that lease is *ipso facto* void by the very creation of it. And that is the book of *Dyer* (a), though there was one Judge of another opinion (b). Well then ; this remainder is limited to commence from and after the death of tenant in tail ; therefore it is void. But you will say, Here he covenants to stand seised to the use of himself for life, the remainder over, so that the estate to arise upon the covenant to stand seised did arise in his own life-time. To this they answer, that the covenant to stand seised to the use of one's self is void, except it be for the sake of the remainder over, and the remainder being to commence after his death is void, and the covenant to stand seised to his own use cannot be good for the sake of a void thing. If one covenant to stand seised to his own use in tail, it had been good ; for which he quoted *Carrington's Case* (c). Now what is the reason that such estate is void, when it is limited to commence after the death of the tenant in tail ? It is because it is to commence at a time when the right of the estate out of which it would issue is in another person by a title paramount the conveyance, *viz. per formam doni*. A tenant in tail has an estate out of which he may carve out other

(a) The case of *Puttenham v. Puttenham*, *Dyer*, 297. a. pl. 25.

(b) *Cro. Jac.* 457.

(c) *Moor*, 366.

estates,

MACHIL
against
CLARK.

estates, provided he does it out of the estate * in himself, so as to make it rightful in its creation, but otherwise not ; for it would be injurious to make good a lease or other estate commencing upon the right of another, whose title is paramount the lease or estate so made ; and in the principal case, the issue in tail has a title paramount the title of the remainder, by virtue of the covenant, the very minute the remainder would take effect : and that is the only true reason ; and therefore to make such an estate to take effect upon the possession of the issue, whose title is paramount, would be to make an estate take by wrong the very minute it has its creation. Now for case and judgment in the principal point there are many authorities (a). And the words of *Bedingfield's Case* (b) are full of the reason that I give. I do, you see, disagree with *Littleton* ; for if you take him according to the letter, it contradicts the *Case of Fines* (c) ; and if I have contradicted *Littleton*, I have done it upon great authority, viz. the *Case of Fines*, and *Hob.* 319. where he says, "the law abhors *abeyance*, and never suffers it but in case of necessity." And he took notice of the case in 1. *Saund.* 260. in the common pleas, which authority, he said, was against him upon the first matter, viz. FIRST, If a tenant in tail make a bargain and sale, the bargainee has no more, says that book, but for life of bargainor, though the *habendum* were to bargainee and his heirs ; and so they then held it. But I must take the liberty to disagree with them, because I have the authority of *Seymour's* and other cases with me ; for we may with as much decency deny their authority, as they have denied that of *Seymour's Case* ; for a fine to a stranger shall extinguish the right of an intail, but cannot enlarge any estate before made out of the estate-tail ; so that if the estate which the tenant in tail makes may possibly commence during his life, such estate shall, after his death, continue until avoided by the issue ; but if it cannot commence until after death of issue, it is absolutely void.—SECONDLY, If a tenant in tail covenant to stand seised to the use of J. S. who is of his blood, for his life, with remainder over to another, and dies before the remainder happens, yet * the remainder is good until it be avoided by actual entry of the issue ; otherwise it will exist after the death of the issue, because the estate for life had taken effect ; and the remainder might have taken effect during the life of the tenant.—THIRDLY, If a tenant in tail make a lease and release to the use of himself for life, with remainder over to another, the remainder over is good until avoided, though it be to commence after the death of the issue in tail ; and the reason is, because it issues out of the estate by lease and release, which is good until avoided by entry. He said, the grounds he went upon were his own, but his Brothers concurred with him in the main.

• [28]

And the judgment in the common pleas was affirmed (d).

(a) 2. Co. 51. Yelv. 51. Moor, 383. 3. Lev. 291.

(b) Cro. Eliz. 895.

(c) 3. Co. 84.

(d) See the case of Goodright on the Demise of Tyrill v. Mead and Wilson, 3. Burr. 1703. Stapleton v. Stapleton, 1. Atk. 8.

The

Cafe 34.

The Queen against Rogers.

The common ser-
jeant may file an
information in
the mayor's
court.

AN INFORMATION was exhibited against Rogers in the name of THE COMMON SERJEANT of the City of London in THE MAYOR'S COURT, grounded upon a custom in London to punish in that manner any that should give opprobrious or affronting language to any of their aldermen.

To speak con-
temptuously to
an alderman,
while holding a
wardmote, is
not indictable.

S. C. 2. Salk.
425.
S. C. Holt, 331.
S. C. 2. Ld. Ray.
777.

Post. 92.
1. Mod. 35.
3. Mod. 139.
6. Mod. 124.
Jones, 229.
Cro. 78.
Moor, 347.
2. Lev. 200.
1. Vent. 16.
1. Sid. 65.

The information set forth another custom, for holding A LEET on such a day yearly in the several wards; that Sir Robert Jeffreys was steward of such a leet in such a ward, and sat in the said court, held at, &c. as steward; that the defendant made an assault upon him, and contemptuously said, "He has as much to do there as I have; he mistakes himself, for he is not now among his Bridewell birds, and the next year he shall keep his court there (a)."

This matter being brought up by *habeas corpus*,

IT WAS MOVED that the defendant should be discharged. There is nothing in the words for which an indictment lies, except the assault; for at most they are but words of disrespect, for which there is no other remedy than to bind the party to good behaviour, or for want of sureties to commit him, and that may be lawfully done in case of disrespectful words to A MAGISTRATE; or if one in a court behave himself insolently, he may be committed immediately as for a contempt.

* [29]

Besides it was said, there was nothing in the words but what was true. * The defendant was a suitor, therefore he was bound to be there, and he had a right to be there. The steward was not among Bridewell birds; and as to "he shall not hold court there next year," he had a right to hinder it, for the court was held in THE CHURCH, and he was churchwarden.

HOLT, Chief Justice. It may be that they have a custom to punish by INFORMATION for reasonable cause, but it will be a great question, Whether the cause here be such? and, Whether there may be a custom to make words more criminal than the common law makes them? This is not like the case of calling a woman "a whore," which is punishable there; though not at common law; for that is grounded upon another custom of punishing fornication there, which is not punishable anywhere else. And he said, that a contemptuous carriage and behaviour to a

(a) Sir Robert Jeffreys was governor of Bridewell, and also AN ALDERMAN of the city of London. He held a wardmote in the church of the parish of which the defendant was then churchwarden. The defendant made an assault upon him, and said, "If I am churchwarden next year, you shall ask my leave to keep your

"wardmote here;" upon which Sir Robert Jeffreys called him "a rogue and a rascal;" and the defendant replied, "I have as much to do here as you;" "you think, sure, you are among your Bridewell birds; you are mistaken." S. C. 2. Ld. Ray. 777.

magistrate,

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magistrate, was a breach of the *good behaviour*, and he to whom such affront is offered, may bind him to his *good behaviour*; or, if he have no sureties, commit him until he find some: so in this court, if a witness be insolent, we may commit him for the immediate contempt, or bind him to his good behaviour; but we cannot indict him for it: and that is the course according to the common law of *England*: And a binding to good behaviour is not by way of punishment, but it is to shew that when one has broke the good behaviour, he is not to be any more trusted. Giving a man *the lie* in *Westminster-Hall*, or in any great concourse of people, is a breach of the good behaviour.

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against
ROGERS.

1. Sid. 144.

1. Lev. 107 and
see 1. Hawk.
P. C. 7. edit.
ch. 21. f. 9.

THE COURT at last awarded a *procedendo* as to the assault, for they may have a custom to punish by INFORMATION, such as assault the magistrate.

Vide 1. Vent.
327.

Shirly against Right.

Case 35.

A CAPIAS AD SATISFACIENDUM issued upon a judgment after a year and a day, without a *scire facias*, and the sheriff executed it, and afterwards suffered him to escape. On an action for the escape,

A *capias ad satisfaciendum* is not void, although a full Term intervene between the *teste* and the *return*; and therefore if the sheriff execute such a writ, and the prisoner escape, he cannot take advantage of this on an action of debt against him for the escape.

The question was, Whether the sheriff could take advantage of this in bar of the action?

And that he could not, the authorities in the margin were quoted (a).

* MOUNTAGUE offered, a diversity, that where the error appears on the face of the writ itself, the sheriff is not bound to execute it, and by consequence if he do execute it, he may let the party go away again; as if a *capias ad respondendum* be taken out in *Trinity Term*, returnable in *Hilary Term*, for it ought to be returnable the next Term (b).

* [30]

HOLT, Chief Justice. In *real actions* if there come an *alias summons*, they give an intermediate Term before the return of it, because of the statute of *Dies in Banco* (c): so in a writ of dower (d). But in *personal actions*, where a *capias ad respondendum* lies, it must be continued down from one Term to another; and if such process issue out of this court in *Trinity Term*, returnable in *Hilary Term*, the cause is thereby out of court, for if it be not continued in every Term it is gone; and if a sheriff should take

S. C. 3. Danv.
121.
S. C. 1. Salk.
273.
S. C. Holt, 761.
S. C. 2. Ld. Ray.
775.
Post. 64.
Comb. 250.
726. 1226.

Ld. Ray. 241. 399. 424. 788. Stra. 901. 951.

(a) Mo. 274. 2. Saund. 100. Dyer, 175. 21. Hen. 7. 16. Poph. 205. 3. Cro. 893. 1. Leon. 30. 3. Cro. 271. 288. 436. 2. Rol. Ab. 560. 21. Edw. 4. 23. 8. Co. 121.

(b) Vide 2. Keb. 261. 2. Rol. Rep. 442. 1. Rol. Abr. 484. Stil. 337.

(c) The statute of *Dies in Banco* was made in the fifty-first year of Henry the Third.

(d) See the statute 34. Hen. 8. c. 21. for abridging *Trinity Term*; and 16. & 17. Car. 1. c. 6. for abridging *Michaelmas Term*.

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one

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RIGHT.

one by such process, and let him go, he would not be liable, because the cause is out of court. But here is an execution returnable at a second Term. Where is the mischief in this case? For the sheriff is to detain him in execution, and he has no opportunity at the return of the writ to discharge himself. The sheriff is to keep him until the Court call for him at the return of the writ; and then a *habeas corpus* goes to bring him in, and he is delivered to the prison of the court; and if the Court think it not convenient to have him the next Term, but will skip a Term, where is the harm of that? For let the return be when it will, he is to be kept in custody both before and after it: but upon a *capias ad respondendum* it is otherwise; for there, by putting in bail, the process is determined, and by a long return the defendant is hindered from coming to make an end, and discharge himself of the action. But it will not hold to say, that where the sheriff is excused by the process, there he shall be liable to an action of escape, for an escape of one taken by virtue of that process; for if a writ be *tested* out of Term, yet he may safely execute it, but the plaintiff that sued it out cannot take advantage of such writ: and this was *Sir John Lenthal's Case (a)*: so he said, that in the principal case, this at most was but an erroneous matter.

1. Saund. 161.
1. Lev. 254.
2. Lev. 109.

And PER CURIAM, judgment was given for the plaintiff *nisi*.

(a) 2. Danv. Abr. 123. 2. Keb. 384. 3. Keb. 487. 2. Lev. 109. 1. Freem. 198.

* [31]

Case 36.

* Anonymous.

Prohibition
quoad.

Post. 98. 125.
113. 137. 148.

Ld. Ray. 123.

138. 212. 236.

423. 512. 856.

1205. 1507.

Fitzg. 189.

Comy. 25. 309.

ALIBEL was brought in the spiritual court, for that J. S. being the parson of such a church, did make himself drunk at THE SACRAMENT, and that he was a whore-master.

And upon a suggestion, that the spiritual court would proceed to a deprivation, and that the benefice was a donative, a *prohibition* was granted *quoad* the suing in order to deprive, but not *quoad* the other matter.

Stra. 715. 776.

Case 37.

George against Pierce.

A witness la-

ing declared that

he received a

guinea to con-

ceal the truth is

no ground for a

new trial.

Post. 156.

IN order to a new trial, an affidavit was read, that one of the witnesses had declared that he had got a guinea to stifle the truth.

GOULD, Justice. An affidavit of him who had the guinea would be something, but a witness saying so is nothing. A witness's laying a wager in the cause is no hindrance to his being a witness, for the other has an interest in his evidence, which he cannot deprive him of.

1. Stra. 643. Sayer, 100. 1. Term Rep. 11. Tidd's Practice, 606.

Anonymous.

Anonymous.

Cafe 38.

HOLT, Chief Justice. If AN EXECUTOR *de son tort* deliver the goods to the administrator before action brought, he may plead *plene administravit*.

Executor *de son tort*.

- 1. Salk. 113.
- 1. Show. 242.
- 3. Salk. 161.
- 3. Lev. 34.
- Ld. Ray. 661.
- 1216.
- Stra. 1106.

SECONDLY, If administration be first granted, and then another take the goods, he is not thereby EXECUTOR *de son tort*.

Anonymous.

Cafe 39.

IF one be brought up upon an *attachment*, you can have no more than his answer upon interrogatories, and if he forswear himself, he is subject to a prosecution of perjury.

Interrogatories on an attachment.

Cro. Car. 89.

- 6. Mod. 43.
- 1. Stra. 444.
- 4. Burr. 2106. 2129.
- Tidd's Practice, 256.
- 3. Hawk. P. C. 273.

Anonymous.

Cafe 40.

HOLT, Chief Justice. The owners of THE GATE-HOUSE prison have no charter to sue a commission of *gaol-delivery*, and it is hard to maintain a right to a gaol without such a liberty. There is an act of parliament, that all felons shall be committed to the county-gaol; the meaning of which is, if there be not a franchise and power to sue for a *gaol-delivery*: and such suit must be made in chancery.

Wherever there is a gaol, there must be a right of *gaol-delivery*.

* [32]

* The Queen against Mason.

Cafe 41.

AN INQUISITION found that Ford had forfeited his office of WARDEN OF THE FLEET, upon which it was seized into the queen's hands. The defendant, Mason, brought a *monstrans de droit* in chancery on the inquisition, and set forth a title, and traversed Ford's being seized; so that by consequence he could not forfeit the office. To this THE ATTORNEY-GENERAL demurred. The cause was brought into the court of king's bench by THE CHANCELLOR.

Possession on an inquisition.

- S. C. 2. Salk.
- 447.
- 1. Salk. 441.
- 395.
- 5. Mod. 57.

It appeared that the title which Mason had set forth was a bad one; but Mason as *amicus Curie* still insisted that Ford had not forfeited the office, and therefore that the queen had no title.

It was urged that no judgment could be given for the queen, and that the whole record being here, it must be affirmed or subverted by the Court.

HOLT, Chief Justice. When a man is put out of possession by virtue of an inquisition returned for THE QUEEN, and another comes and pleads his right, that is a distinct record from the inquisition; and so if another come and plead his right, that is another distinct record. And if demurrer be to all, then it is determined

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MASON.

2. Saund. 252.
1. Mod. 94.
1. Lev. 209.

there, or may be sent into this court to be argued and determined; but if issue be joined in it, then the way is to award a *venire facias* out of chancery, returnable at a day certain in the queen's bench, and the record is delivered hither *per manus* of THE CHANCELLOR, &c. to be here at the day of the return of the *venire facias*; but the inquisition is never sent hither; but the party comes in chancery, and complains of his being aggrieved by the inquisition, and prays that he may be admitted to shew his right, and plead against the inquisition; and that is a *monstrans de droit* (a); and all the operation of the inquisition is to make title for the king, and the party comes in as plaintiff, and either traverses it, or shews his right consistent with it. And if he will traverse it, he must shew title in himself. The case of *Jefferson v. Dawson* was part on demurrer and part on issue, and if there be a *mispleader* and a *repleader* awarded, that must be in this court; and where there is issue and demurrer, and the party will not proceed on the demurrer, the Court will give judgment on the demurrer; and though some books have a saying, that a record may be sent out of chancery hither, even upon demurrer, I would fain see where it has been done (b).

(a) See Lord Somers' argument in the *Bankers' Case*, Skin. 601.

(b) THE COURT held, that the record of the inquisition itself was not before the Court, but only the record of the *monstrans de droit*; but that although the record of the inquisition was not so before the Court as that they could quash it with respect to all persons, and thereby deprive them of shewing their right in chancery where the record is filed, yet as the *monstrans de droit* recited the inquisition, and concluded *preut paet per recordum inquisitionis in filaciis curie cancellarie*, it was before the Court with respect to the plaintiff in the *monstrans de droit*; so that if thereby a title appeared for him the Court might give judgment, and, if the inquisition falsified be set

aside, so far as to make way for the party's right, and if the party's right can be collected from the inquisition, it shall be affirmed by the judgment.—But THE COURT also held, that if the party suing a *monstrans de droit* appear to have no right, he cannot mend his case by taking exceptions to the inquisition as *amixur Curie*, although it appear by these exceptions that the queen has no right, or that the right is in another; for that a party suing a *monstrans de droit* is a plaintiff and may be nonsuited, and if he fail in his title he is gone as effectually as if he were nonsuited, and no judgment need be given for the queen. Accordingly judgment was given in the present case, that *Mason* should take nothing by his writ. S. C. 2. Salk. 448.

Case 42.

Foster's Case.

A plaintiff may be nonprossed for not declaring, though the defendant appeared voluntarily.

ONE took out a writ, and the defendant voluntarily appeared, and gave notice to the plaintiff's attorney of bail filed; the plaintiff did not declare; the defendant signed a *non proseq.* for want of a declaration (a).

And HOLT, Chief Justice, held it well enough.

S. C. 12. Mod.
448. S. C. 1. Salk. 455. Tidd's Pract. 235.

(a) See the statute 13. Car. 2. st. 2. c. 2. l. 3.

Gay

* Gay against Crofs.

Cafe 43.

THE PLAINTIFF brought an action on the cafe for a false return to a *mandamus*, to swear him COMMON-COUNCIL-MAN for the borough of Totnefs.

By charter from *Queen Elizabeth* the manner of their election was chalked out for them; and a uſage was given in evidence to a jury at THE BAR, that the election had gone quite contrary, which uſage was allowed to be good evidence of a bye-law whereupon it was founded:

So the Couneſel on both ſides conſented to have it found ſpecially, and to have it determined by THE COURT, Whether ſuch a bye-law, and a long uſage purſuant to it, could alter the direction, or rather annihilate the direction of the charter?

The jury having given their verdict in private over-night, ſaid, that they had found the matter ſpecially, and the next day in court delivered their verdict for the defendant generally, and would give no reaſon for it, nor be moved to depart from it.

And hereupon a new trial was moved for, and the cafe of *Wood v. Gunſton*, in *Stiles (a)*, and a cafe of the *Welſh Drivers (b)* were quoted for new trials after a TRIAL AT BAR.

And though THE COURT were very much diſſatisfied with the jury, and HOLT, *Chief Juſtice*, ſaid he never had known the like, and that he would have but little value for the verdict of a jury that would not, at a Judge's deſire, declare the reaſon which had induced them; and that as the Judges do publicly declare the reaſons of their judgments, and thereby expoſe themſelves to the cenſures of all that be learned in the law, and yet there is no law obliges them to it, but it is for public ſatisfaction; ſo the jury ought for the ſame reaſon, to declare the reaſon of their verdict, when required by the Court; yet notwithſtanding all this, it being a trial at bar,

THE COURT would not grant a new trial (c).

(a) *Stiles*, 462.

(b)

(c) But ſee *Stiles*, 466.

584. 2. *Ld. Raym.* 1358. 2. *Str.* 1105.

1. *Burr.* 395. 4. *Burr.* 1986. 2. *Bl. Rep.* 698. 3. *Will.* 146. 338. New trials granted after a trial at bar.

Rice againſt Serjeant.

Cafe 44.

A MAN having obtained a judgment for a juſt debt againſt *A.* took out a *ſieri facias* and got the ſheriff to ſeize the goods, but would not let him proceed farther; but ſuffered the goods to remain in the cuſtody of *A.* the debtor. *B.* who had alſo ob- defendant, may be taken at the ſuit of another creditor.—*Poſt.* 118. 6. *Mod.* 184. 191. *Ld. Ray.* 555. 1072. 2. *Varp.* 239. *Comy.* 35. *Str.* 226. 461. 515.

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RICE
against
SERJEANT.

tained a judgment against *A.* for a just debt, took out a *fieri facias*.

* [38] *

The question was, Whether he could seize upon the same goods?

And PER CURIAM he may, for the former was a fraudulent execution (*a*), and the sheriff might very well return *nulla bona* upon the first execution.

(a) See Stephen v. Sol^r, 1. Vezey, 352. wards v. Harben, 2. Term Rep. 587.
Bourn v. Dodson, 1. Atk. 154. Bam- Mace v. Cadell, Cowp. 232. Cook's
ford v. Baron, 2. Term Rep. 594. Ed- B. L. 417.

Case 45.

Smith against Villars.

If the claimant of an *earldom* be arrested by the addition of *gentleman* the Court, to prevent prejudice to his claim, will allow him to give bail without joining in the recognizance.

THE DEFENDANT pretending to be *Earl of Buckingham*, and being arrested by the name of *J. Villars, Arm.* upon motion concerning bail to be put in by him;

S. C. 1. Salk. 3.
6. Mod. 80.
Ld. Ray. 64.
249.
1. Stra. 205.

THE COURT said, that he might without prejudice put in bail by the name by which he was arrested; because, being a civil action, he need not join in the recognizance, as the custom is in criminal causes. And that in the case of the *Earl of Banbury*, who was indicted by the name of *George Knowles, Esq.* because, by the course of the Court, he ought to join in the recognizance, and if he had entered into one by the name of *George Knowles*, it would be an estoppel upon him, therefore the Court indulged him to bring others who gave bail for him by the name of *George Knowles, Esq.* for their act could not conclude him.

2. Stra. 811. 1. Bac. Abr. "Abatement" (D).

Case 46.

The Queen against The Mayor of Carlisle.

Attachment.
Ante, 1.

AN ATTACHMENT granted against him for proceeding after a *certiorari* delivered.

1. Salk 9. 148.
201. 396. Psst. 84. Ld. Ray. 469. 609. 766. 1102. Stra. 63.

Case 47.

Rule of Court.

Proceedings are not stayed by a reference.

PER CURIAM. A submission of a matter to a reference is no stay of suit for that matter, if it is not particularly so agreed on.

S. C. 2. Ld. Ray.
789. 1. Mod. 24.

Cromp. Pract. 263.

Case 48.

Anonymous.

Copyhold.

Ld. Ray. 996.

HOLT, Chief Justice. A copyhold estate is not to be seized upon a recognizance.

Anonymous.

Anonymous.

Cafe 49.

PER HOLT, *Chief Justice*. If a deed has no date, or an impossible date, you may declare, that the defendant by his deed on such a day and year did so and so, and upon *oyer* there will be no variance; but if you say that by his deed of such a date, or bearing date so and so, and upon *oyer* the deed has no date, or an impossible one, it will be a variance.

1. Salk. 76.
2. Salk. 463.
498.
6. Mod. 244.
Ld. Ray. 336.
354. 403. 703.
791. 1242. Stra. 1186. 1198 1241.

Anonymous.

Cafe 50.

NOTE, It was strongly instanced by LUTWICHE in the common pleas, that a *tolt* does not lie in a personal action.

And THE COURT seemed to be of the same opinion.

* [39]

* Memorandum.

Cafe 51.

BY HOLT, *Chief Justice*. It shall be a rule for the future, that upon the moving of indictments here by *certiorari*, we will not hear a motion in arrest of judgment until the defendant has appeared.

Certiorari.
Ante, 10.
1. Salk. 78.
Stra. 1083.

The Queen against Blacket and Robinson.

Cafe 52.

LEAVE was given to file an information *pro malegestura* against them, for procuring a gentleman's son to marry a woman of infamous reputation (a).

Information.
Cafes T. T. 53.
Gillb E. R. 172.
1. Peer Wms.
Stra. 1107.

705. 2. Peer Wms. 111. 561. 3. Peer Wms. 116.

(a) See *Rex v Twisselden*, 1. Sid. 387. Others, 5 Mod. 221. See also 4. Hawk. 1. Lev. 257. *Rex v. Serles and Others*, P. C. 85. 1. Black. 386. 1. Burr. 606. Cro. Car. 557. *Rex v. Thorp and*

Brooks against Stroud.

Cafe 53.

TWO were made executors, and an action brought by them. They set forth, that they were made executors, and that they both proved the will, and, by THE PROBATE produced, it appeared that one only proved it; and the matter being pleaded in *abatement*, the plaintiff had judgment *ouster*, and the Year-Book 21. Hen. 4. was quoted: Two were made executors; one of them proved the will, they both have the right in them; and the other cannot refuse until after the death of him that proved, but then he may. If one of them is severed, the other shall go on.

Went. 59. Dyer, 160. Pro. Ch. 173. Cafes T. T. 127. Stra. 20.

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Case 54.

Duke of Norfolk's Case.

If a plaintiff die after verdict, yet judgment may be entered within two Terms.

S. C. 1. Salk. 401.
S. C. Holt, 400.
Tidd's Pract. 300. 695.

A VERDICT was given in *Easter Term*; and before the judgment was entered the plaintiff died.

Per HOLT, *Chief Justice*. That shall not hinder the judgment from being entered, provided, says the statute, it be within two Terms after. And as to 29. *Car.* 2. c. 3. the statute of Frauds and Perjuries, that only requires the time of signing judgment should be entered on THE ROLL, and that is only for the benefit of purchasers; for if judgment be signed in Vacation, yet it is entered as of the Term before; and none but a purchaser shall be admitted to say, that it was signed at any other time; and it is the course of the Court to let all things be done in the Vacation, as of the Term before.

Case 55.

Anonymous.

Ejectment.

Ld. Ray. 312.

341. 404. 737.

830.

Comy. 113. Stra. 531. 960. 1180.

BY HOLT, *Chief Justice*. In case of tenants in common, there must be an actual *ouster* of one by the other, or else he shall not be compelled to confess lease, entry, and *ouster*.

* [40]

Case 56.

* Anonymous.

A second *scire facias* must be *tested* on the return of the first.

BY THE COURT. In a *scire facias* against bail, the second must be *tested* on the return of the first, and both cannot be taken away at a time; there ought to be fifteen days inclusive between the *teste* of the first and return of the second.

Post. 138. 196.

Ld. Ray. 1179. 1259. 1467. See also the last point in the case of *Atwood v. Burr*, ante, 3. and the cases there cited.

Case 57.

Anonymous.

Information lies for gaming.

2. Roll. Abr. 78.
Comb. 16.

1. Salk. 379.

1. Mod. 42. 2. Hawk. P. C. 113. 4. Hawk. 85. Ld. Ray. 865.

AN INFORMATION was filed against one for drawing in several to play with him for money, and putting *false dice* upon them. *Ex motione* SALKELD.

Case 58.

The Queen against Templeman.

After pleading guilty to an indictment, the defendant may give evidence that justifies the fact in mitigation of punishment.

AFTER pleading guilty to an indictment, you may give any thing in evidence that justifies the fact, or proves him not guilty of the fact; for the entry is *non vult contendere cum dominâ reginâ, sed ponit se in gratiam Curie*. And it is not like the case where one is found guilty by verdict.

—S. C. 3. Dany. 253. S. C. 1. Salk. 55. Stra. 872.

Smith

Smith against Angel.

Case 59.

Easter Term, 13. Will. 3. Roll 325.

DEBT by the plaintiff and his wife as executors of *Matthew Field*, against the defendant, as son and heir of *Justinian Abel*, upon several obligations by which the father bound himself and his heirs, upon several conditions, &c.

In debt on bond against an heir, if the defendant has no assets by descent, except a reversion after a lease for years and extinction of dower allowed by chancery to the ancestor's wife, the plaintiff shall have a general judgment *de bonis propriis* against the defendant.

The defendant confesses the action, and that the bonds are the deeds of his ancestors; but says, that his father was seised in fee of four parts in six of such a close, and of three parts in four of another close; and of three parts in four of a messuage, and the issues and profits thereof; that the said obligor in his life-time by his indenture bearing date, &c. a counterpart whereof he produced in court, demised the said parts and shares to *Henry Greenwood* for five hundred years; by virtue whereof he entered, and was possessed for the term aforesaid; that the father died seised of the reversion which descended to the defendant; that he was thereof seised, and that at the time of exhibiting the bill, or at any time since, he had not any land or tenements by hereditary descent, besides the reversion of the tenements aforesaid; that after the death of his father, and the said descent, in the ninth year of *William the Third*, there was a suit in chancery between *Edward Thompson* and others and *Elizabeth Angel*, wife of the defendant's father, and the defendant, in which suit it was decreed and adjudged in the said court, * that *Elizabeth Angel* should have one third part of the premises for her life for her dower, by virtue whereof the said *Elizabeth Angel* was seised of a third part of the premises for her life, and so prays judgment whether he, as son and heir to his father, ought to be charged beside the reversion of the term aforesaid and of the third part whereof the wife was endowed when it should fall.

* [41]
S. C. 1. Salk. 354.
S. C. 2. Ld. Ray. 783.
1. Keb. 156.
3. Salk. 157. 178.
2. Mod. 50.
Comb. 162.
Ld. Ray. 53. 728.
1. Vern. 93.
188. 234. 282.
348. 419. 429. 471.
2. Vern. 61.
Prec. Ch. 39. 232.
3. Peer Wms. 9. 166. 217. 330. 341. 401.
Stra. 665. 379. 1028. 1270.
3. Bac. Abr. 33.
4. Bac. Abr. 69.

The plaintiff craves oyer of the lease; by which it appeared, that in consideration of three hundred pounds he had demised the premises for five hundred years, provided that if the father, or his executors or administrators, paid fifty pounds a-year to *Henry Greenwood* during his life, then the estate should cease; AND REPLIES, that the defendant after the death of his father entered, and was thereof seised, and took the profits, besides the third part to his wife, which would be sufficient to pay the fifty pounds a-year; and so prays judgment.

The defendant rejoins and says, that he did not enter *modo et formâ*; and concludes to the country.

The plaintiff demurs.

HOLT, Chief Justice, delivered the opinion of THE COURT, after several arguments at THE BAR, and said, It was not doubted, but that the plaintiff ought to have judgment; but the question was,

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against
ANGEL.

was, what judgment ought to be given him ; whether a special one, to have execution of the lands and tenements mentioned in the plea, or generally against him as heir to his ancestor ? We have considered both ; and WE ARE OF OPINION, that there ought to be a general judgment against the defendant, by which his body, his goods, his lands which are not assets, may be taken in execution.

Two things are considerable herein.

FIRST, The pleading of a reversion of a term for years made by his ancestors ; whether pleading a lease for years, be good and allowable in a defendant sued as heir to his ancestors ? and whether that be sufficient to hinder the plaintiff from immediate execution ?

SECONDLY, Whether pleading of an assignment of dower to the wife, and that he had a reversion expectant thereupon by court of chancery, be good ?

• [42]

AS TO THE FIRST, the case is this : A man by bond obliges himself and his heirs to pay so much money, then makes a lease for years and dies, whereby the reversion in fee descends to his heir ; the question is, Whether the heir may * plead this lease for years in bar of execution, or confess assets, without taking notice of the term for years ? There are indeed some few precedents, and I have known it practised where it was pleaded ; but I am not willing to deliver my opinion as to that point now, because the case does not require it ; but it seems to me, that it should not be matter lying in the mouth of the defendant to plead any such matter ; for he might without danger confess that he had *assets*, without taking any notice of the lease. To have the freehold and inheritance of the estate descend to him, makes complete assets, and that he has from his ancestors ; therefore he has complete assets. If it were a lease for life, made by the ancestor, and only a reversion in fee expectant thereupon had descended from the ancestor, that would not be assets in possession, but a reversion in fee expectant upon an estate for life ; and there he had not a freehold, as here he had, but a reversion expectant upon a freehold. Besides, it appears by the *Statute of Gloucester*, and the 21. Hen. 8. c. 15. that the common-law did not much regard estates for years, for such estate was subject altogether to the will of him in reversion ; for if he in reversion had suffered a recovery by collusion or default, the termor was bound by it, and his term was lost without remedy, as appears by the comment of my Lord Coke upon that statute (a), even after the *Statute of Gloucester*, which gave a termor for years liberty to come and falsify a recovery had against tenant in reversion. Again, leases for years becoming more considerable, and yet more precarious, because of the frequency of common recoveries, which now became a common conveyance, the statute of

(a) 2. Inst. 321. Co. Lit. 46.

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21. Hen. 8. c. 15. became a further remedy for termors; yet notwithstanding these statutes, it never lay in the mouth of a tenant to a *præcipe* to plead a lease for years, or to stop execution upon any such plea. If an *assize* be brought against a tenant for life, he cannot say there is a lease for years precedent to his right, though the tenant for years himself may falsify a recovery against him in reversion: so the same reason holds in this case; for the obligation of the father attaches upon the land, being *assets* in the heir's hands. On a *scire facias* grounded upon a fine to execute a fine (a), whereby lands were conveyed by grant and render to one and his heirs in tail, the tenant pleaded a warranty of the ancestors of the plaintiff, and that *assets* descended to him; the plaintiff replied that the *assets* that did descend were extended for the king's debt; and it was not held a good plea, because the freehold and inheritance did descend, and * they were present *assets*. If it be so in the case of a *real lien* so as to bind the land in case of warranty, surely the same reason, where the heir is charged upon account of *assets*, in an action of debt upon the lien of the ancestor. The books say he might plead a lease for years as to the value of the *assets*, for *assets* in a real action is no more than *assets* are worth; so that if plaintiff is not to have it discharged of the term for years, the reversion is less worth. Then if it be a good plea, the consequence is, that an immediate *extendi facias* do go to appraise the reversion upon inquisition taken, and then to deliver it to the plaintiff to enter into it, when it falls in possession: As in *Dyer*, 246. Debt against an heir who pleaded he had nothing but a reversion expectant upon an estate for life; the plaintiff joined with him and took judgment upon the confession, and to have execution when reversion falls in possession; so if this be a good plea, the same must be done here. In *Hern* (b) there is a precedent of this matter. There is no mischief to him in remainder, nor to the lessee, for he will defend his possession in ejectment by virtue of his lease. But we do not give any conclusive opinion in this matter.

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against
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* [43]

SECOND POINT. The dower to the wife is ill pleaded, for it is not said that the wife was endowed by metes and bounds, nor that THE LORD CHANCELLOR did endow her, but that there was a decree in chancery, by virtue whereof she was endowed; and that is not to be understood; for THE CHANCELLOR has nothing to do in assigning of dower, but in case of lands holden of the king in chivalry, and the heir's being in wardship to the king; and in such case, when she came in as his wife, and prayed to be endowed, the king's title appearing on record, a record was necessary to find her title; and so an inquisition was taken, and upon her being found thereby to be his wife, THE CHANCELLOR used to assign her dower, or to award a commission for it (c). And this was the legal way for the wife to recover her dower of lands in the king's hands, by the reason of the wardship of the heir; for as every

Ld. Ray. 438.
785.1293.1384.

(a) Bro. Abr. "Assets" 9. Year-
Book 43. Edw. 3. pl.

(b) Hern's Pleader, 307.

(c) Fitz. N. B. 363.

guardian

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* [44]

guardian might assign dower *in pais*, so the dower in chancery is by the king himself, in a judicial and proper manner: but for chancery to decree that the wife should have such a third part, would not vest a legal interest in her; the heir may do it in pursuance to a decree; and when he does, the wife is in by virtue of the assignment of the heir, and not by virtue of any decree. Then if the decree be not a title vested, he has confessed *assets*, for he set forth only a reversion depending upon * a freehold, and does not shew there was a freehold; and if the assignment of dower were good, *pro tanto*, yet here is two thirds whereof she was not endowed, and that is only charged with an estate for years, and that is enough to charge him with a general judgment.

The case of *Davis v. Powys* (a) comes home very near to this case in every respect. In debt against an heir, if he plead any plea, that is not a sufficient bar; if he suffer judgment to go against him by *nihil dicit*, or confession, it shall be a *general judgment*; because there is no way for the heir to defend himself, but by setting forth the truth, what assets he has, where they lie, and to open the truth of the case to the plaintiff; and let him take what benefit he can of it; and if he do not do this, there ought to be a *general judgment* against him, as well as upon demurrer. This authority was murmured at, but there is not a word of it but what is good law (b). If the heir will confess that he has *assets by descent*, in such and such places, besides which he has no more, and the issue is that he has more, though he confess enough, yet if more *assets* be found, there shall be a general judgment (c).

In this case, it is not in the power of the Court to give a special judgment, if the plaintiff do not desire it, for it would be erroneous (d). If it be by consent of the plaintiff, they may give a special judgment; But how can we do so here? If it be upon the confession, we must allow the plea good; that is, that it is a reversion expectant upon an estate for life, when it appears that it is not so. If he had pleaded that he had only a reversion expectant upon an estate for life, and the plaintiff had replied that the tenant was dead or had surrendered, and it is so found by verdict, surely there must be a general judgment, because he has pleaded a false plea in bar of the plaintiff's execution; and it appearing to us, that there never was such an estate for life in being, it is of the same effect as if a verdict had so found it.

Let the plaintiff have a general judgment.

(a) Plowden, 420.

(b) See S. C. Moor, 520. Cro. Eliz.

(c) 2. Leon. 11.

(d) 2. Roll. Abr. 71.

Case 60.

Anonymous.

A *distingas* is the process of the hundred-court.
S. C. ante. 1.

BY HOLT, Chief Justice. A writ of *levari facias* is not the proper process of a hundred-court, but it is a *distingas*; but a *levari* may be by custom.

Anonymous.

Anonymous.

Case 61.

BY HOLT, Chief Justice. Upon bringing the bail-piece to Mr. CLARK, and giving him satisfaction that the principal rendered himself before, or upon the return of the second *scire facias*, he will give you a discharge or *superfedeas* of the *scire facias*.

Post. 77.
Ld. Raym. 156.
342. 353.

* [45]

* The Queen against Ogden.

Case 62.

AN ORDER was affirmed at the quarter sessions of the peace for the county of Dorset.

It was an order of two justices of the peace of the said county, founded upon a clause in the act of parliament, in the 8. Will. 3. c. 15. for enlarging the common highways (a). There was an *ad quod damnum* sued out, and an *ad nullius damnum* returned; and an order thereupon made for inclosing such an ancient highway, and setting out a place for another in such a place; and an appeal from this order to THE SESSIONS, and there the inclosure was declared to be a great nuisance to the whole country.

Proceedings upon a writ of *ad quod damnum* to inclose an ancient highway.
Cro. Car. 266.
Vaugh. 341.
Yelv. 141.
Ld. Ray. 725.
858. 1169. 1170.
Stra. 944. 1004.
1209.
2. Hawk. P. C. 153.
1. Com. Dig. 400.

Several exceptions were taken to the order of the justices at the quarter sessions.

FIRST, That it did not appear to have been at the next quarter sessions after the order made (b).

SECONDLY, An exception was taken to the whole purport of the order; that it did not appear by it, what the way to be inclosed was, or what the new way, without which there was no certainty what the subject matter of the appeal was; for this being a method that the statute has ordained for the determination, and making a final end of the matter, surely the thing whereof a final end is made, ought to appear very certain.

It is fit to consider the very statute, what alterations are made by it, and what not.

FIRST, It is to be known that this clause does not alter at all the nature of the writ of *ad quod damnum*; but that writ is the same as it was before, and to be proceeded on as if this statute had not been made; there are not any words in the statute that do alter the nature of the writ, nor the method of proceeding thereupon, though there be something added.

SECONDLY, This writ, after it is executed, is to be returned into the court of chancery; and in that case the sheriff having taken an inquisition, makes a return thereof *indilatè*; so are the words of the writ; so that now the writ is returnable* into chancery; and for this reason it is, that if the queen see thereby that there is no harm to inclose, she may grant leave to do it; and in

* [46]

(a) See now the 13. Geo. 3. c. 78. c. 19.

(b) See Ex parte Venner, 3. Atk. 172. 2. Hawk. P. C. ch. 76. l. 70.

order;

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order to that the inquisition must find that it is *ad damnum nullius*, and there can be no foundation of inclosing without such a return.

THIRDLY, Without licence or grant to inclose the old way, though the inquisition find that such inclosure would redound to the damage of none, and it be so returned, yet none could lawfully inclose, or if he did he would be guilty of a nuisance (a). For it is not the inquisition and return that gave any authority to inclose; but the licence of THE CROWN grounded thereupon; and when there was such an inquisition, return, and licence, without any traverse of the inquisition, upon inclosure made, there was an alteration made of the way; and the old way ceased to be a way, and the new one set out became the common highway.

It would be a strange construction upon that clause of the statute, that a man should have a right to inclose without a licence, to make so great an alteration, as to make the finding of an inquisition tantamount to a royal licence; for though the inquisition do not find it to the damage of any person, yet it is in the election of the king or queen to let the old one stand or not. And there is nothing in this act to induce us to make so great a leap as that is.

Suppose an inquisition be taken, and returned into chancery, that would be a foundation for a licence; for the words of a writ are, what harm would it be to us, or to any of our subjects, that such a way, describing it in certainty, should be inclosed; and a new one, describing in the same manner, set out: but you will say that the *ad quod damnum* is now under the consueance of the justice of peace, and an appeal thereupon given to the sessions; how can it then go into chancery? Very well, if the sheriff, after inquisition taken, does get it enrolled as the statute requires, returns it into chancery, as he is bound to do by the command of the writ; and all that the statute requires is, that the inquisition be enrolled at the next quarter sessions; and if it be, and no appeal from it, or if there be an appeal, and a judgment thereupon for the inquisition, the traverse is thereby taken away: and it is a good plea to a traverse, that the inquisition was enrolled, and no appeal; or that an appeal was brought, and the judgment for the inquisition.

* [47]

It may be asked, when the appeal is to be brought? The words of the statute are express, that it be at the next sessions after the inquisition found. But they say farther, it is to be by the person grieved by the inclosure; so that you must take both the words together; that is, it must be at the next sessions after the inquisition taken, and the inclosure, for it cannot be sooner; for till inclosure there is no grievance, and it must be somebody aggrieved by the inclosure. Here is indeed an inclosure; but it is not an inclosure by virtue of the inquisition, according to the *ad quod damnum*, for it is without licence, and not by the authority

(a) See a. Hawk. P. C. ch. 76. f. 3.

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of the act of parliament; and therefore not such as does oblige the party to appeal. THE QUEEN
against
OGDEN.

PER TOTAM CURIAM therefore the inquisition was quashed.

Anonymous.

Case 63.

BY THE COURT and all THE CLERKS. It is irregular to sign Judgment can-
a judgment, without serving a rule to bring in a record. And not be signed
a judgment was set aside for want of it. without a rule
to bring in the

record.—Tidd's Pract. 692.

Anonymous.

Case 64.

BY THE COURT. No man, though by consent of parties, can
be attorney on both sides.

Anonymous.

Case 65.

THE COURT many times will fix the transitory action, Transitory ac-
where the defendant has not had probability of an indiffe- tion.
rent trial.

Comb. 47. 483.

Ld. Ray. 331.

1253. 1418. 1. Vern. 267. 439. 1. Mod. Caf. L. & E. 228. 316. Stra. 211. 858. 878. 1258. 1216.

The Queen against Clerk.

Case 66.

PER CURIAM. An information tried at THE BAR is not An information
within the late statute, 5. & 6. Will. & Mary, c. 18. of giving tried at bar is
costs against the prosecutor; for that says, the party shall enter not within 4. &
into a recognizance of twenty pounds, and that the party shall have 5. Will. & Mary,
a *seire facias* thereupon; but twenty pounds would be too small c. 18.
costs in the case of a trial AT BAR. 2. Ld. Ray. 1036.
3. Burr. 1616.

Anonymous.

Case 67.

BY HOLT, Chief Justice. If a Judge who tried a cause be afterwards A Judge re-
put out, upon a motion made for a new trial, he may certify moved may re-
to the Court what his opinion was when he tried the cause. port the evi-
dence on a new

trial.—Ld. Ray. 1513.

MICHAELMAS

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MICHAELMAS TERM,

The First of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Edward Northey, *Esq. Attorney General.*

Simon Harcourt, *Esq. Solicitor General.*

* *Elvis against Mercato.*

* [48]
Case 68.

IN A MOTION to put off a trial, the attorney made an offer *die Luna* to bring money into court; and a rule was thereupon made, that the other side should shew cause why the trial should not be put off on those terms.

An attachment lies against an attorney who neglects to pay money into court pursuant to consent.

At which day the other side consented.

3. C. 1. Salk.

So the rule was drawn *ex consensu*, and the trial put off.

314.

And now the money not having been brought into court, an attachment was granted against the attorney.

3. C. Ld. Ray.

265.

MOUNTAGUE objected, that though the attorney had made such a proposal, yet he had not consented the second day.

6. Mod. 43. 36.

1. Salk. 87.

1. Com. Dig.

"Attorney"

(B. 15.).

But *PER CURIAM*, He shall not aver against the rule, which says it was by consent; and we will not have our attornies trifle with us, and make a proposal to-day and fly from it to-morrow.

1. Term Rep.

423.

Tidd's Pract.

124. 256.

Case 69.

Read against Tregeagle.

A bond and judgment given for a just debt shall not be set aside, though entered up and executed contrary to the agreement of the parties.
Post. 118.

Q. Mod. 134.

* [49]

READ gave a bond and judgment to *Tregeagle*, defeasanced upon payment of money on such a day certain; and it was agreed by the same deed between the parties, that *Tregeagle* should not sue any execution against *Read* before the sixteenth of July. On the fifteenth of June, *Tregeagle* sued out a *fiere facias*, delivered it to the sheriff before the sixteenth of July, and got it executed on the sixteenth of July, upon demand and non-payment.

BRODERICK moved to set it aside; for that the plaintiff, by breaking his agreement, had *incapacitated the defendant to perform; for by the delivery of the writ to the sheriff, the property of them was bound, so that he could not sell any of them to raise the money.

But **PER CURIAM**, Since it is for a just debt, and judgment executed, we will not now undo anything; for, perhaps, that would be a means to frustrate the judgment: and besides, you have no oath that any purchaser was deterred by reason of taking out and delivering the writ; and here *Read* had a good remedy by action of covenant.

Stra. 323. 1242.

HOLT, Chief Justice, remembered the like case, where covenant was brought, and damages thereupon recovered.

And **THEY ALL SAID** the rule was, that where a mischief was on either side, and a remedy on the one, and none on the other, they would suffer that to continue against which there was a remedy.

HOLT, Chief Justice, said, that an *audita querela* would not lie in this case, because that would pull up all by the roots, and avoid the whole judgment.

Case 70.

Anonymous.

A *fiere facias* against a plaintiff in error is only to compel an assignment of errors.

AFTER A WRIT OF ERROR sued out, if a *fiere facias* be brought against the plaintiff in error, to shew cause why there should not be execution on the judgment, the end of it is, to compel the plaintiff to assign errors; and execution ought not, in strictness, to be taken out, until *non prof.* entered.

Ld. Ray. 405. 1295. Fitzg. 175. Comy. 117. 321. and the case of *Cox v. Mosley*, Carth. 40.

Case 71.

Anonymous.

The *ris prius* record may be amended by the paper-book.
Post. 156.
Ld. Ray. 134.
421. 2101.

ASSUMPSIT BY AN ADMINISTRATOR, for goods sold and delivered by his intestate, and a promise likewise to him. The defendant pleaded "*non assumpsit infra sex annos* to the plaintiff." The plaintiff replied a promise to the intestate within six years, and issue thereupon, and verdict for plaintiff.

And

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And this being moved in arrest of judgment, and appearing thus ANONYMOUS
upon the record of *nisi prius*,

PER CURIAM. If the *paper-book* or copy of the issue was right,
we would amend it; and made a question, Whether it be not within
the statute of *Oxford*?

Anonymous.

Case 72.

HOLT, *Chief Justice*. Confession is the worst sort of evidence,
that is, if there be no proof of a transaction or dealing, or, at
least, a probability of dealing between them; as here there was,
the one being a sailor, and the other a captain of a ship.

Evidence.

1. Vern. 53.
Stra. 416. 309.

• [50]

• Withers against Harris.

Case 73.

HOLT, *Chief Justice*. If one will take out execution within a
year after judgment, he may continue it down after the year
by *vicecomes non misit breve*, without being put to a *scire facias*.
And he said, he had known it adjudged on debate, that there was no
need of a *scire facias* to have execution in ejectment after the year
and a day; but he said, he never could agree with that opinion, nor
see any reason for it; for in all real actions, as upon fine *sur concessit*,
there must be a *scire facias* after the year.

In ejectment, if
no execution be
sued within a
year, the judg-
ment must be
revived by *scire
facias* before ex-
ecution shall is-
sue.
S. C. post. 69.
S. C. Salk. 258.
600.
S. C. 3. Salk.
319.
S. C. Holt, 77.
265.
S. C. 2. Ld.
Ray. 306.

And ALL THE COURT were of the same opinion.

But it was referred to THE MASTER to examine, Whether it
was after the year or not, or whether there had been a *vicecomes
non misit breve* of any execution taken out within the year?

And it appearing on examination to be after a year and a day, no
process taken out within the year, IT WAS HELD, that it could not
be the process in ejectment; for execution is an *habere facias pos-
sessionem* for the Term, and a *fieri facias* for damages.

Anonymous.

Case 74.

BY THE COURT. You cannot change your attorney without
leave of Court, to be obtained on motion, though he be ever so
great a cheat.

1. Peer. Wms. 460. 3. Peer. Wms. 104. 277. Stra. 76. 402. 414. 547. 621. 633. 693. 1. El. Rep. 8.
Doug. 206.

Attorney cannot
be changed with-
out leave.

Wood against Sutton, Marshal of the Court.

Case 75.

JUDGMENT was given against him in debt for an escape; and
he brought a writ of error, and put in sham bail, and so on,
toties quoties, they were excepted against.

Upon affidavit of this, a rule was made peremptorily for his
putting in good bail on such a day, or else execution to go.

Bail.
6. Mod. 57.
Stra. 419. 781.
526. 872. 877

Case 76.

Anonymous.

If a defendant's attorney do not pay the issue-money in twenty-four hours after issue delivered, judgment may be signed.

2. Salk. 515.
Comy. 533.
Stra. 735. 1177.
Sayer, 19.
Tidd, 466.

* [51]
Case 77.

Anonymous.

If a plea in abatement be over-ruled, and a *respondens ouster* awarded, a copy of the plea in chief only need be delivered and paid for.

1. Salk. 5.
2. Ld. Ray. 329.
Carth. 447.
5. Mod. 399.
12. Mod. 119.
Tidd's Practice, 463.

BY THE COURT and THE CLERKS. When there is a special issue tendered, and the other side joins in it, the book is sent back to the defendant's attorney, and he has *four days* given him, either to join in the issue, or to waive it and give the general one; and after the four days, he ought to send the paper back without any demand of the attorney of the other side; and if he fail in it, the other may sign judgment for want of joining in issue: but if the attorney will take back the book after the four days, and receives money for entering the * issue or making up the record, he shall not afterwards enter his judgment.

A PLEA IN ABATEMENT was over-ruled, and a *respondens ouster* awarded, and the *general issue* pleaded.

It was a question, Whether the defendant's attorney should deliver a copy of the issue, declaration, and the record of the plea in abatement, to the plaintiff's attorney, and pay for it? And the printed rule of the Court was read.

THE COURT would consider of it, though the constant practice was agreed to be, that the defendant's attorney should do it.

And **IT WAS MADE A RULE**, that it suffice for the future, after plea in abatement over-ruled and general issue pleaded, for the defendant's attorney to deliver a copy of the declaration and issue, without any copy of the plea in abatement.

NOTE, It is a constant practice for a plaintiff to sign judgment by default, for want of a copy of the issue and paying for it, and to execute a writ of enquiry (a).

(a) See *Combe v. Pitt*, 3. Burr. 168a. where a plea in abatement and judgment of *respondens ouster* were omitted in the plea roll, and the Court held the omission

to be immaterial, particularly as the defendant had accepted and paid for the issue. Tidd's Practice, 464.

Case 78.

— against Tempest.

Non est factum specially pleaded.

6. Mod. 117.
1. Salk. 274.
Ld. Ray. 787.
803.
Comy. 303.

DEBT UPON A BOND. A special *non est factum* was pleaded, with a conclusion of *et hoc paratus est verificare*. The plea also referred to a condition in the bond without any *oyer* had of it; and there was a demurrer for both causes.

As to **THE FIRST** it was said, that it was either way, *viz.* to aver or to conclude to the country. And *Keb. 3. fol. 132. Hil. 25. Car. 2.* was quoted; and the case of *Day v. Roberts*, in this court, in the year 1693.

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To which opinion **HOLT**, *Chief Justice*, inclined : as if in bar to a debt upon a bond one should say, that he delivered it as an *escrow*, to be delivered over as his deed upon such a thing to be done ; which being not done, the plaintiff got the deed, *et sic non est factum, et hoc paratus est verificare*, and leave the plaintiff to tender issue in the replication.

—
against
TEMPEST.

As to **THE OTHER**, it seemed a fatal exception.

Plaintiff had judgment.

Anonymous.

Case 79.

SCIRE FACIAS against bail who had rendered their principal before a Judge, but he immediately escaped.

Bail render the principal.
Post. 77. 85. 98.

And they moved to file the bail-piece, in order to plead a render of principal.

Ld. Ray. 156.
721. 1452. 1467.
Comy. 554.
Stra. 443. 526. 1270.

PER CURIAM. We cannot deny leave to file the bail-piece, for without it they may plead *nul tiel record* to the *scire facias* ; for one cannot proceed upon the *scire facias* without bail-piece be filed.

* [52]

* Anonymous.

Case 80.

BY HOLT, *Chief Justice*. If we see one against whom there is a judgment of this court walk in *Westminster-Hall*, we may send our officer to take him up, if the plaintiff desire it, without a writ of execution.

The Court may execute a judgment without a writ.
3. Salk. 46.

Anonymous.

Case 81.

HOLT, *Chief Justice*. If one be arrested after the return of a writ, false imprisonment lies against him who so arrests him (a).

False imprisonment lies against a bailiff for arresting a man after the return of the writ.

Here complaint was made to the Court, that one was arrested in *Trinity Term*, by virtue of a writ returnable in *Easter Term*, and a bail-bond taken for appearance at the time of the return of the writ.

1. Mod. 56.
6. Mod. 96.
1. Sid. 229.
Moor, 711.
3. Cro. 130.
408.
1. Salk. 8.
Ld. Ray. 353.
Stra. 509. 1184

PER CURIAM. There is good matter to plead against an action upon the statute of 23. *Hen. 6. c. 10*. And though the bond be antedated, yet it may well be done with a *primo deliberat.* at the true time.

The fact was referred to **THE MASTER** to examine, in order to punish the officer for oppression.

(a) See *Lidford v. Thomas*, 6. Mod. Rep. 29. and *Planck v. Anderson*, 95. *Loveridge v. Plaistow*, 2. H. Bl. 5. Term Rep. 37.

Case 82.

Fuller's Case.

The marshal of the queen's bench may fetter a prisoner in execution for a fine.

Post. 114.

Ld. Ray. 136.

FULLER being committed to the queen's bench for a fine to the queen, and charged in execution at the suit of several others, **THE MARSHAL** had a jealousy of him, and put irons upon him.

Upon which he wrote a letter to **THE ATTORNEY-GENERAL**, craving his help.

THE COURT, on this being communicated to them, ordered the marshal to keep him according to law, declaring, that if he died through cruel usage, it would be murder in the gaoler; but owning also, that he might justify putting him in irons if he feared an escape, or if he were otherwise unruly.

Case 83.

The Queen against Buckbridge.

An indictment for being "a common drunkard" is too general.

Salk. 382.

6. Mod. 256.

§ 11. Ld. Ray. 1013, 1094. 1197. 1363. 3. Petr. Wms. 493. 499. Fitzg. 56. 122. 263. Stra. 2. 3. 497. 699. 866. 995. 1246. And see 4. Hawk. P. C. 7. edit. ch. 25. f. 59. and f. 74.

AN INDICTMENT was found against *Buckbridge*, for that he was a common drunkard, and a common profane swearer and disturber of the peace, and a constant frequenter of tippling-houses,

And the indictment was quashed, for that the charge was too general and loose.

* [53]

Case 84.

* Anonymous.

A warrant of attorney given by a *feme sole* is not revoked by her marriage.

S. C. 12. Mod.

383.

S. C. 1. Salk.

117.

2. Saund. 213.

Comb. 242.

Ld. Ray. 1050.

Stra. 81.

Tidd's Pract.

300.

A FEME-SOLE having a warrant of attorney to enter judgment to her, married before it was entered.

KING moved, that it might be entered, and that the judgment should be to the husband and wife; and he took a difference between such a warrant made by a *feme-sole*, and one made to her; for a marriage in the first place would be a countermand of the warrant, as being to the disadvantage of the husband. And for this he quoted a case in point, in *Easter Term*, in the ninth year of *William the Third* (a), where leave was denied to enter a judgment against husband and wife, upon a warrant by the wife before marriage; and compared it to the case of a grant of a reversion by a *feme-sole* who marries another before *attornment*, the grant is countermanded; but if she had granted it to *A.* and before *attornment* had married him, an *attornment* after were good (b).

THE COURT inclined to this opinion.

But upon the reading of the warrant, it appeared to be to enter judgment as of such a Term, which was now past (c).

(a) 1. Salk. 399.

(b) Co. Lit. 310. 4. Co. 61. 2.

(c) See 1. Mod. 1. and Tidd's Pract.

Watts against Rosewell.

Case 85.

THE CASE being again moved (a), the case of *Ward v. Forth* (b) was quoted as an authority in point, that the conclusion was bad; for that by the general conclusion he had waived the special matter of the plea: for it is a rule in pleading, that when a man pleads special matter, and concludes generally, he thereby waives the special matter.

And it was agreed on both sides, that here he might have pleaded general.

On the other side, the case of *Manning v. Bucknal* (c) was quoted, which was this: Debt upon an obligation; the defendant pleads, it was delivered as an escrow, and so *non est factum*, *et hoc est paratus verificare*; to which the plaintiff demurred generally, because it tended to the general issue: and the Court said, that this is a plea which may conclude either way, and is most usual with this conclusion; though generally, when the negative plea doth waive all precedent, he shall conclude to the country; as on *non assumpsit infra sex annos*.

But there being no judgment in the case of *Manning v. Bucknal* (d), the plaintiff had judgment *nisi*; *absente Holt, Chief Justice*.

(a) The former motion in this case is not reported in this volume. — It was an action of debt on bond; to which the defendant pleaded, that it was delivered as an escrow to be his deed, upon the plaintiff's sealing and delivering a general release; and that the said release was never signed and delivered, and so it was *not his deed*; concluding with a *verification*. The plaintiff demurred, and shewed for cause, that the plea ought to have concluded to the country. S. C. 1. Salk. 273, 274. See — *v. Tempest*, ante, 51.

(b) 1. Vent. 210. S. C. 3. Keb. 26.
(c) 3. Keb. 142.

(d) The judgment, as reported by *Kebles*, was for the defendant *nisi*, 3. Keb. 142. but no judgment whatever is entered on the roll, 1. Salk. 274. It is said, however, that the Court changed the opinion they had given on the first motion, and that judgment was ultimately given for the plaintiff, 2. Ld. Ray. 803.

Anonymous.

Case 86.

PER CURIAM. If a Judge at a trial erroneously over-rule a matter offered in evidence, the regular way is to tender a bill of exception; yet if, upon such a matter, the party will suffer the trial to go against him, it is good cause of a *new trial*.

* Hyon against Ballard.

Case 87.

PROCEEDINGS ON BAIL-BOND, for want of bail above. Upon a motion to stay proceedings, the defendant produced a release under the seal of the plaintiff; and thereupon the plaintiff's attorney,

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HYON
against
BALLARD.

attorney, suspecting it, consented to deliver a declaration forthwith, and that the defendant should plead the release, and so try it; which being done, the plaintiff was nonsuited at the trial; but afterwards, it being discovered to be a notorious forgery, a motion was made for a new trial.

But THE COURT said, they could make no rule in the case, the plaintiff being out of court upon the nonsuit.

But since the rule to stay proceedings upon the bail-bond was not absolute, but till the Court should farther direct, that, said THE COURT, was still before them; and therefore let the rule be, that they shew cause why proceeding should not go on. QUON NOTA.

Cafe 88. The Queen against The Parish of Caple, in Surrey.

Order for removal quashed.

S. C. Sett. &

Rem. 207.

Ld. Ray. 41.

395. 513. 567.

3332. 1454.

1473.

Comy. 86. 97.

Stra. 393. 544.

427. 698.

AN ORDER OF TWO JUSTICES was made to remove a man and his two children out of the parish of *Caple*, where he might become chargeable, he having not rented a tenement of ten pounds a-year.

AND IT WAS HELD, that saying they "might become chargeable" was not well; but it should be, that they were "likely to become chargeable."

But IT WAS HELD, that saying they had not rented a tenement of ten pounds a-year did suffice.

The order was held bad as to the children, for they are only removeable as persons not settled and likely to become chargeable, or so young as they are not able to provide for themselves.

And it was quashed as to the children.

* [55]

Cafe 89.

The Queen against Sir John Bucknell.

An indictment for not repairing a bridge, alledging that the defendant ought to repair it, because

"he now is, and

"for divers years

"last past was,

"lord of the ma-

"nor, &c." is

insufficient, for

he is not liable as

lord of the manor;

and therefore it ought to have shewn, that he was liable

ratione tenuræ, or by prescription. S. C. post. 93.—S. C. 1. Salk. 358. S. C. 6. Mod. 150. S. C.

Holt, 128. S. C. 2. Ld. Ray. 792. 804. Post. 93. Stra. 180. 900. 2. Ld. Ray. 856. 1175. 1249

AN INDICTMENT was brought against *Sir John Bucknell* for not repairing a certain bridge, &c. which he was bound to repair *eo quod* he was lord of the manor of *De La More*. And it being moved hither after conviction,

BRODERICK moved, that there were but three ways that a man could be liable to such a charge: first, by his deed; secondly, by prescription; or, thirdly, *ratione tenuræ*; * that this here could be none of them; and therefore the indictment was bad (a). *Stiles*, 400. *Latch*, 106. *Noy*, 93.

he is not liable as lord of the manor; and therefore it ought to have shewn, that he was liable *ratione tenuræ*, or by prescription. S. C. post. 93.—S. C. 1. Salk. 358. S. C. 6. Mod. 150. S. C. Holt, 128. S. C. 2. Ld. Ray. 792. 804. Post. 93. Stra. 180. 900. 2. Ld. Ray. 856. 1175. 1249

(a) See *Sir Henry Spiller's Case*, *Stiles*, 108. Anonymous, *Stiles*, 400. Anonymous, *Latch*, 206. S. C. *Noy*, 93.—

See also the Year-Book, Mich. Term, 5. Hen. 7. page 3, pl. 3.

HOLT,

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HOLT, *Chief Justice*. A man is not bound to repair a bridge because he has a manor, or is lord of a manor. But it must be said, that this is some charge upon the manor that can oblige the man to repair, and that only can be one of these two ways:—FIRST, That he held the manor by the service of repairing the bridge, &c. that is, *ratione tenuræ*; and this being a charge upon the possession, is like any other service for which the tenant in possession is chargeable. Every tenant in possession, be he but tenant for years or at will, is bound to repair; and immediately upon default of repair, he is indictable. The other way of charge is by *prescription*, and then it must be the *terretenant*, and all those whose estate he has did use and were bound to repair; and here you neither shew *tenure* or *prescription*. But as to charge of repairing a bridge, it will be well to say, that *omnes occupatores, &c.* But where one goes to charge the estate of another with anything for his own benefit, he must either say, that he and all those whose estate, &c. or at least *omnes terr. tenentes (a)*.

THE QUEEN
against
SIR JOHN
BUCKNELL.
6. Mod. 150.
255. 307.
Post. 98.
1. Salk. 358.

Vide 6. Mod. 4.

And here, *PER CURIAM*, the judgment was stayed.

(a) See the case of *Rider v. Smith*, 3. Term Rep. 766.

The Queen against Harris.

Case 90.

AN ORDER OF JUSTICES for discharging an apprentice upon the statute of 5. *Eliz. c. 4.* was quashed, it being not signed by them, as that statute requires.

An order to discharge an apprentice must be signed.

Ld. Ray. 1198. 1410. Stra. 48. 69. 143. 704. 1013. 1110.

And CHESHYRE said, that one piece of wax could be the several seal of several people, putting their seals severally to it.

Denning against Close.

Case 91.

A PLAINT was levied in an inferior court before the debt contracted, and an arrest upon a process upon the plaint.

Inferior court.

And *PER CURIAM* adjudged ill.

Ld. Ray. 231.

309. 1100. 1530.

Anonymous.

Case 92.

A WRIT OF ENQUIRY is set aside daily for excessive damages.

Writ of enquiry.

2. Leon. 214. 3. Leon. 117. Ld. Ray. 1411. 1. Mod. Caf. L. & E. 349. Stra. 425. 515. 1259. 3. Burr. 1846. Tidd's Pract. 324.

* Lucy against The Bishop of St. David's.

* [56]
Case 93.

HE was taken up by an *excommunicato capiendo*, and in the gaol of NEWGATE; and the writ being not yet returnable, he removed himself up by *habeas corpus*.

Excom. cap.

Return.

S. C. post. 117.

S. C. 1. Salk. 106. 294. S. C. 2. Ld. Ray. 817. Ld. Ray. 619. 701. 1. Peer. Wms. 435. 3. Peer. Wms. 55. Stra. 43. 76. 265. 413. 946. 1067. 1189.

And

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LXXV
against
THE BISHOP
OF
ST. DAVID'S.

And PER CURIAM, He has no day in court, until the writ of *excommunicato capiendo* be actually returned; for the command of the writ was, to take and keep him; and to return the writ, how he had executed it; but upon such return likewise the party has no day in court, but must bring himself in by *habeas corpus*. And before he can plead to the writ, it must be returned here on record, for the writ is to be adjudged good, or qualshed, as it is good or bad upon their plea; and the enrolling of the writ on the record, at its issuing out, is not enough to give day in court, or to appear to and plead.

And the Counsel of the other side insisted on it, and obtained leave to examine the *habeas corpus*, which recited the writ of *excommunicato capiendo* with the writ.

And here it was complained of, that a double writ of *excommunicato capiendo* was taken out with a double return, to the end if he were taken by one and discharged, he might be taken up again by the other, and so vexed.

THE COURT very much disapproved of this practice; though it was agreed, there might be two, if there were two excommunications for the same cause.

So he was remanded.

But being brought up again at the day on which the writ was returnable, and the writ being then returned;

He offered a plea in parchment, which, reciting the several writs of *excommunicato capiendo*, by which he had been taken up and detained, one upon a *significavit* of excommunication for not paying costs, upon a sentence against him before the archbishop upon his ordinary jurisdiction, and the other upon a *significavit* upon a sentence on an appeal of the former sentence before the delegates;

Post. 57. 117.
6. Co. 52.
1. Vent. 293.
Tidd, 44.

His PLEA was, that he was made *Bishop of St. David's*, and called to parliament by writ at such a time; after that he sat in parliament as A PEER; and so concluded in *abatement*, because a *capias* did not lie against A PEER.

NOTE, He farther set forth in his plea, that he was brought up to this court by *habeas corpus*, and turned over to the custody of THE MARSHAL, and then pleaded,

But the truth being otherwise, THE COURT made him strike that part out of his plea; for the filing of an *habeas corpus* here did not make * him a prisoner to the marshal; for the Court, notwithstanding, may remand him to *Newgate*.

* [57]

ANOTHER MATTER in their plea was, it begun with a *petit judicium de brevi præd.* concluding with *unde petit judicium*, &c.

But

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But THE COURT held that well, the plea having begun right.

NOTE, The question intended was, If a peer should be excommunicated, and continue so forty days, what remedy shall there be against him? Question.
Ld. Ray. 1119,
1442.
3. Peer. Wms.
455.
Stra. 734- 985.
1065.

And it was said, there was none but that of being expelled the pale of the church, and the communion of the faithful.

But POWELL, Justice, said, he knew no law but a *cap. excom.* lay against a bishop or other lord.

But HOLT, Chief Justice, The question is not before us, and therefore let us not meddle with it: and he said, he did not believe they were in earnest with their plea.

But it was excepted to the *significavit* as recited in their plea, and so was the writ of *excommunicato capiendo* too, that he was condemned in costs, in *quodam negotio officii sive correctionis*. Significavit.
Exceptions,

This was said to be ill for uncertainty; for it was said, the writ of *excommunicato capiendo* ought to recite the *significavit* right, that the Court might know what process to award upon the statute of 5. Eliz. c. 23. which, in all cases of excommunication, orders the writ to be sent into this court, and entered on THE ROLL here, and then delivered to the sheriff; and in case he be not taken thereupon, to issue another *capias*; and this in all cases except the nine mentioned in the statute; but if it be for any of the nine mentioned in the statute, then upon a *non est inventus* returned to issue a new process, with proclamation and penalty. So that the Court cannot here tell what process to issue, without the cause be certainly mentioned in the *significavit* recited in the *excommunicato capiendo*, that is, whether it be one of the nine causes or not. And they cannot judge on the original *significavit*, for that is not here, but in chancery; and chancery cannot relieve them thereupon, because they are not to make the process upon it; but this court is. But before the said statute, if the *significavit* had not certainly mentioned the cause, it was sufficient.

And HOLT, Chief Justice, put the case of Fowler, a quaker, in this court: some years before he was excommunicated *pro sub-* 1. Salk. 253.
stractione decimarum sive alior. jurium ecclesiasticor. which likewise was judged uncertain; and there, upon consideration, * it was resolved, that before that statute of the fifth of the queen the cause need not be mentioned in the writ of *excommunicato capiendo*; for there, if the *significavit* was not good, they applied to chancery, where the writ is returnable, and there it was quashed. But the statute of 5. Eliz. c. 23. has made great alterations; which statute orders, that the writ be brought into this court, and enrolled here before it was delivered to the sheriff; so the power that was in chancery before the statute is now taken from it, and given to this court; for if the writ be returned *non est inventus*, the *alias capias* shall go out of this court. If it be one of the nine causes, says the statute, * [58]

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statute, there, upon return of *non est inventus*, there must be process, with proclamation and penalty; so there must be an *alias copias*, if it be not one of the nine causes; and if it be, there must be an *alias process*, with farther proclamation and penalty: and this must now be the right way by necessary consequence of law; for if the *significavit* be in chancery, and bad, there can be no remedy there, for the writ is here, and the process is to be made here; and they cannot supersede a writ returnable here, especially after the Court here is possessed of it. Then if the writ be there, how can we give remedy according to the statute, if we do not know what the cause of excommunication is? And how can we know that otherwise but by the writ reciting the *significavit*? for we cannot know by the writ in chancery, which we have not; and it ought to appear to us to be a cause of ecclesiastical cognizance, as it ought to be: and he quoted *Trotter's Case* (a). In the *case of Fowler* (b), the writ was quashed, and he discharged; but that cannot be done till the writ be returned, for it cannot be done on the entry made on THE ROLL at the issuing of it out. And the *case of King v. Hill* (c) was, in *quodam negotio concernen. eruditionem sive instructionem liberorum*, and it was quashed for uncertainty.

And whereas in this case, POWELL, *Justice*, objected the case in *Cro. Car.* 196.; for there the writ only said, for non-payment of costs, and held well enough;

HOLT, *Chief Justice*, said, that he had, upon the debate and consideration of the former cases, viewed many precedents; some immediately after the statute was made, and all of them mentioning the cause in certainty: and besides, the reason of the thing made it absolutely necessary; for to what purpose should the statute enable us to issue process, and to vary our process according to the nature of the offence, * if we have no means to know the offence? And he said, the writ in THE REGISTER was quite altered by the statute, and the writ is only *pro contumaciâ*.

* [59]

And he said further, We are not to issue process here as instruments or conduit-pipes, but judicially as Judges: and it will not be an objection to say, that we may award process at all hazards, and let the party grieved come after and plead to it; for we shall never grant an ill writ, that the party may avoid it in pleading.

And as to the plea of peerage, he said it was a foolish one; and the writ and his sitting in parliament signified nothing; for he was a peer by being created bishop, and the writ and his sitting in the house added nothing to it.

And day being given to the queen's Counsel until *Thursday* following to answer the pleas, and object;

(a) 8. Co. 68. Cro. Jac. 212.
2. Bulst. 139.

(c) Trinity Term 12. Will. 3. 1. Salk.
294. 12. Mod. 517.

(b) 1. Salk. 253.

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The Bishop's Counsel moved to have him bailed, and quoted *Latch*, 174. 204. *Mo*. 406. *Cro. Car.* 501. where one was bailed after plea pleaded.

But THE COURT refused to bail him.

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POWELL, *Justice*, said, it would be of ill consequence to bail him; or if they should judge the writ good, then they would bail a man not bailable by law; and he was remanded to gaol.

THE BISHOP being brought up again, he insisted on his plea; not waiving, however, his exception to the writ.

BRODERICK moved, that he ought not to be admitted to plead; *Vide infra*. by which, perhaps, the matter might be finally determined in his favour, without a *scire facias* to *Mr. Lucy* the promoter, who had been at the charge of the prosecution, and by consequence concerned in point of costs, the excommunication being for non-payment of them.

TO WHICH it was answered, that though the writ nor the statute of the queen did require the sheriff to bring him into court upon the return of the writ, yet the writ was returnable; and he coming in upon a *habeas corpus*, and pleading to the writ at the day of the return of it, the Court could not deny his plea; and that he was not bound to bring a *scire facias*.

TO WHICH THE COURT inclined; but if he had come in after the return of the writ, and desired to plead for his discharge, there, perhaps, a *scire facias* would be necessary.

AND NOTE, Here he had *oyer* of the writ returned before he put in his plea, which was judged necessary.

NOTE LIKEWISE, There were two other writs out, and the sheriff returned upon the *habeas corpus*, that he had him in custody upon both of them; but the two latter were not yet returnable, one of them being returnable the last day of the Term.

* And PER CURIAM, His plea could not go to them, they being not in court till they were returned; for the enrollment of them is only before they are delivered out, to inform the Court, that there are such writs gone out; upon which, if there be a return of *non est inventus*, they may award a new process, or if it be ill, when it comes back, to receive plea or exception to it, and so quash it, and set the party at liberty; but still they are not the writs of this court, so as this Court can supersede them: and the chancery neither cannot supersede them, which was observed to be very inconvenient; for here would be a writ erroneously issued out, and it should be out of the power of any court of England to supersede it. • [60]
Opinio Curiae.

THE PLEA being received, and going generally to the writ, it was again questioned, whether there should not be a *scire facias* to the promoter? *Vide supra.*

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And that there should, was quoted the case of *Codrington v. Rodman (a)*. And he compared it to the case of pleading a pardon, where there must be a *scire facias*.
HOLT, Chief Justice, said, that in case of pardon by parliament, though it extend to all the king's subjects, yet the Court is not bound to take notice of it if it be not pleaded, if the very act does not expressly command them to do it.

THE COURT said, that the consideration of a promotor in this case, in regard to his costs, would be different from a case where one sues for tithes, or for defamation, or the like; for there the whole suit is the plaintiff's: but here the suit was the queen's, and Lucy only promotor.

PER CURIAM. One may have a day given him upon a *habeas corpus* for the queen, because she is always present in court. And if a man outlawed be taken upon a *capias utlagatum*, and brought in custody into court upon the return of it, that is a sufficient day for the defendant to plead against the king: and yet there he cannot plead to have pardon allowed without a *scire facias* against the party to the original suit, which *scire facias* is to be taken out, and grounded upon the letters patents of pardon suggested; but the present case is not like that, for here the promotor is not such a person as ought to have a day in court, before the plea on the *excom. capiendo* be determined.

And because they insisted upon the plea here, the king's Counsel had time *ad respondend.* to their plea.

NOTE, It was not *ad replacitandum*.

* [61] And here * again they prayed he might be bailed; and for authorities were quoted, 1. Cro. 507. 552. 558. 1. Bul. 122. Latch, 174.

HOLT, Chief Justice. It has been done, but it is matter discretionary in the Court whether they will do it or not; and why shall they do it upon such a plea as this, which is mere fact?

And though POWELL, Justice, said, by the statute of *Westminster the Second* he ought not to be bailed;

Yet IT WAS AGREED, that act did not absolutely bind the Court, but that they had a discretionary power; and it was done not long ago in the case of *Davison (b)*, who was excommunicated for teaching without licence.

HOLT, Chief Justice. If a man be taken in execution, and he bring an *audita querela*, upon producing a deed of release, and proof made thereof, we do bail him, though that be matter of fact: but here it is notoriously known, that *the Doctor* is deprived, and some of the Judges of this court have been of the Delegates when the sentence was confirmed; and though, judicially, we cannot

(a) Cro. Car. 198. S. C. 1. Jones, 227.

(b) 1. Ld. Ray. 603. Salk. 195. take

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take notice of that sentence, it not being judicially before us, yet we can take such notice of it as to guide our discretion by it.

And it was said by THE COURT, that one had never been bailed in this case but upon such exception taken as the Court plainly saw was not maintainable; but according to your plea, a bishop cannot be excommunicated, so as to be anyway more punishable than in the primitive times, before the Church had any help of the lay power.

And he was committed again to NEWGATE, there being two other writs on which he was taken yet unreturned.

MR. ATTORNEY-GENERAL after this, and before the day of return of the other writs, came and informed the Court, that the Doctor had served a rule on SIR SAMUEL ASTRY, Clerk of the Crown, to reply to his plea by such a day.

And at the day, he took out a peremptory rule to plead, and served it on MR. ATTORNEY. Rule to reply.

And because THE COURT was acquainted by MR. ATTORNEY, that the queen was concerned in point of interest, there being an information of intrusion against him in THE EXCHEQUER for the temporalities;

And THE COURT were of opinion, the first rule ought to be on THE ATTORNEY-GENERAL; and for that there never is a peremptory rule in the first instance, the rule on MR. ATTORNEY was set aside;

IT WAS AGREED, if this were a common crown * cause, as a riot, misdemeanor, &c. the rule ought to be on SIR SAMUEL ASTRY: but here the queen being concerned in point of interest, it ought to be on MR. ATTORNEY-GENERAL (a). * [62]
Note.

(a) The Court quashed the writ of excommunicato capiendo, and discharged the defendant, and refused to take any notice of the plea. S. C. 2. Ld. Ray, 318. S. C. post. 117.

Fifth against Horner.

Case 94.

IT WAS AGREED, that if a plaintiff accept of an assignment of the bail-bond, and the defendant put in the same bail that were put in to the sheriff at the return of the writ, the plaintiff cannot except against them; but it is otherwise where he has not taken an assignment. Bail to the sheriff cannot be excepted to as bail above.
Post. 117.

1. Salk. 97.
6. Mod. 62. Tidd's Pract. 135. 153.

Anonymous.

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Cafe 95.

Anonymous.

Debt lies on a judgment pending a writ of error. **D**EBT was brought upon a judgment in the court of common pleas pending a writ of error, and the writ of error pleaded in abatement.

Arte, 14. Post. 140. To maintain the plea, the case of *Cremer v. Wickett (a)*, lately in this court, was cited.

1. Mod. 79. But by POWELL, Justice, It has been often attempted, but never could obtain; and so, he said, it had been resolved by ALL THE JUDGES upon consideration had: but he said, the Court would discountenance such proceedings; and therefore would not hold the party to bail.

405. 1179. 1295. Stra. 632. 867. 1186.

(a) 1. Ld. Raym. 509. 12. Mod. 68. Sims v. Tims, 1. Show. 98. and 350.—And see Dashwood's Case, 5. Mod. Dighton v. Glanvil, 4. Mod. 248.

Cafe 96.

Anonymous.

Time to plead in abatement. **U**PON DEBATE about the time in which one might plead in abatement, MR. CLARKE, the Secondary, said, that it had been settled here, that if a declaration be delivered the last day of a Term, the defendant shall have four days in a subsequent Term to plead in abatement; and if a declaration be delivered the last day of a Term as of a precedent Term, the party shall have four days after the actual delivery of the declaration to plead in abatement.

2. Salk. 517. Comb. 19. 251. 3. Mod. 43. Stra. 523. 532. 1192.

But POWELL, Justice, said, that one could not plead as of a precedent Term without imparlance (a).

MR. CLARKE answered, that he might enter it upon THE POST-ROLL without any imparlance, and then the plea is of that Term of which the declaration is.

AND NOTE, The declaration must be as of that Term in which bail is filed; and the defendant in another Term is not bound to accept a declaration as of a Term precedent.

And MR. CLARKE said, that though by consent the defendant does accept a declaration the last day of Trinity Term as of Hilary Term, yet he shall have four days in Michaelmas Term to plead in abatement.

* [63]

(a) See Tidd's Practice, 240. 243.

Cafe 97.

* Anonymous.

A feme covert indicted for a misdemeanor shall not be bound with her bail. **B**RADFORD, a quaker-woman, being charged, on oath, with having published a book called "THE DUTCH CATECHISM," was bound to appear at THE OLD-BAILEY, and obliged to give four persons bail in two hundred pounds each; but being a feme covert, she was not bound herself.

Ante, 10.

Sua. 1120. 1122.

Memorandum.

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Memorandum.

Case 98.

IT is a standing rule of court, that in a country cause after an assize, or in a town cause after two Terms, the Court never stop proceedings upon a bail-bond upon filing common bail (a).

Stay proceedings on bail-bonds.

(a) In what cases the Court will stay proceedings on bail bonds, see Tidd's Pract. 156.

The Queen against Lilly.

Case 99.

INDICTMENT FOR ASSAULT AND BATTERY, and taking out of the custody of A. and B. several goods mentioned in the indictment, *quæ quidem bona* one J. G. serjeant at mace to A. and B. then sheriffs of London, *virtute ejusdem warranti*, to them duly made in that behalf, then had taken in *debitâ juris formâ*, by reason whereof they had the goods in custody.

An indictment for rescuing goods from a sheriff's officer must lay the property in some person, and shew the judgment and execution under which they were taken.

THE FIRST EXCEPTION was, Because it is not laid that the property of the goods was in anybody.

THE SECOND EXCEPTION was, Because it is not said that there was any judgment or execution thereupon.

And for these exceptions it was quashed.

8. Mod. 165.
248.
Ld Ray. 1032.
1381.

Lord Wharton against Sir John Robinson, Knt.

Case 100.

TRIAL AT BAR concerning boundaries of lands. The parson of the one parish, the land lying in two parishes, was refused, because he might enlarge his own parish, and by consequence the tithes.

The parson cannot give evidence on a question relating to the bounds of his parish.

But one who about seven years before had taken the profits under the title of one of the parties, was received a witness, because now he might plead the statute of Limitation.

Ld. Ray. 1008.
1166. 1353.
1411.

1. Vern. 20. 159. 230. 254. 369. 2. Vern. 317. 375. 472. 637. 699. Prec. Chan. 234. Fitzg. 80. 8. Mod. 60. 1. Peer. Wms. 288. 596. Stra. 34. 101. 129. 652. 723. 1229. See also Bull. N. B. 235. 1. Term Rep. 302. 4. Term Rep. 17.

Anonymous.

Case 101.

PER HOLT, Chief Justice. If A. be bound in a bond to B. to pay him twenty pounds when B. puts in his answer in chancery, there B. to bring action, ought to give A. notice of his having put in his answer.

On a conditional promise, notice of performance must be given.

Ld. Ray. 750. 1157.

* [64]

* Thomkins against Hill.

Case 102.

IT WAS AGREED by the Court, that if any Judge of *nisi prius* allow or over-rule evidence which he ought not to do, upon application to the Court they will grant a new trial; for all writs of *nisi prius* are under the controul of the court out of which they issue.

If evidence be improperly admitted or refused, the Court will grant a new trial.

Case 103.

Withers against Harris.

If judgment be recovered in ejectment, and execution stayed

upon terms until a year afterwards, a *scire facias* must revive the judgment before the *habere facias possessionem* can be issued.

S. C. ante, 50.

S. C. 1. Salk. 258.

S. C. 2. Salk. 600.

S. C. 3. Salk. 319.

S. C. Holt, 77. 265.

S. C. 2. Id.

Ray. 806.

S. C. 3. Danv.

Abr. 337.

Ante, 5. 7. 29. 50.

Stra. 307.

Comb. 250.

Skin. 427.

6. Mod. 14.

288.

Tidd's Pract.

720.

* [65]

JUDGMENT was given in ejectment upon terms, that there should not be execution until such a time, which was a year and a half after.

The sole question was, Whether this judgment could be executed without a *scire facias*?

MOUNTAGUE. It cannot; for in all cases both of real and personal actions, if the plaintiff take not execution within the year and day, the plaintiff is put to have his *scire facias*. A year and a day is the time limited by law for many purposes for prosecuting his right; as to bring an appeal, to make claim on a fine by common law; and at common law, in a real action after judgment, if the party did not sue execution within a year, he was put to a *scire facias*. In a personal action, he was put to a new action upon the judgment until the statute of Westminster the Second gave a *scire facias*. And the reason was, because in that time several things might happen which would be a good bar of execution, if the defendant had opportunity to plead them, which opportunity is now allowed by the *scire facias*, but nothing is pleadable to a writ of execution (a). The reason why a *scire facias* lay at common law was, for that in a real action one could have no other advantage of his judgment; but in a personal action, where an action would lie on the judgment, no *scire facias* lay in that case: and he said, that no reasonable diversity could be made between the case of *habere facias seisinam* and this process in this respect; for if a defendant in ejectment had any matter pleadable in bar of execution in one case, why should it not be so in the other? And he said, there was but one case that he could find that afforded the least ground for such distinction; and that is, the case of *Oakley v. Vicars* (b): it was a judgment in ejectment in the common pleas, and record brought hither by error within the year * and day, says the Book; but the Court took it to be after the year; the plaintiff in error died, and the plaintiff in ejectment took out execution without a *scire facias*, and a *superfedeas* was prayed; and the Court said, that though after the year there ought to be a *scire facias* to have execution of the damage, yet there needs none to have possession of the land; and the Book takes notice, that it was said at the bar, that the like judgment had been before given in another cause; but this was a cause where the defendant himself had brought a writ of error, and after, within a year, he died; so that it was not the fault of the plaintiff that execution was not sued sooner. And upon writ of error brought, if the plaintiff in error discontinue his writ, or it abates, or judgment be affirmed, though in the mean time above a year pass, yet the plaintiff in ejectment shall not there be put to a *scire facias*; but where the plaintiff himself delays for a

(a) Co. Lit. 191. a. 290. b.

(b) 1. Sid. 35. 2. Keb. 370.

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year, he shall be put to a *scire facias* (a). In *Gernon's Case*, in debt upon an escape, in which the plaintiff declared on a judgment had by him against *A.* in the month of *June* before, and that he had proceeded against him until he had outlawed him, the defendant brought a writ of error, and the judgment was affirmed in the king's bench, and within the year the defendant *A.* was taken by a *capias utlagatum*, and the sheriff suffered him to escape; and judged that the action did lie, and that he was in execution at the suit of the plaintiff immediately upon his being taken upon the *capias utlagatum* without any prayer, because there were no laches in him; but if there had been laches in the plaintiff, there he had not been in execution without a particular prayer made by him to have him so in execution, as in case of judgment in debt: where there is a fine likewise for the king, if the defendant be taken upon a *capias pro fine* after the year, he shall not be in execution for the plaintiff without a prayer for that purpose, because he had passed his time of a year and a day without taking out execution; but if he had been so taken within the year, he would be in execution at his suit presently: and the reason of these cases governs the case before quoted out of *Siderfin*; for the writ of error being by the defendant, which suspended the execution until after the year and day, the plaintiff shall not thereby be put to his *scire facias*, there being no laches in him; and he quoted *Cro. El.* 416. 1. *Ro. Ab.* 899. *Cro. Jac.* 364. 15. *Hen.* 7. 5.

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* PEERE WILLIAMS *contra*.

* [66]
Argument for
the execution.

FIRST, He agreed, that if the plaintiff would recover his damages, he ought to bring a *scire facias* before execution of the damage after the year; for the day, he said, was not material, for the damages are merely personal; and therefore, no execution can be of them in this case without a *scire facias*, as well as in judgment in debt.

SECONDLY, He held, that the plaintiff might go by way of *scire facias* if he please; but contended, that it was not necessary to do so. He said, the question in the case in *Siderfin*, before quoted, was, Whether a *scire facias* did lie? but it was allowed to be well without it (b). And he said, an *habere facias possessionem* lay at common law after the year without a *scire facias*; for in all cases where a man's writ was determined by a judgment, though he had passed a year and a day before execution, yet he had some benefit of his judgment; and therefore, if it were in debt, he had his action upon the judgment, being matter of higher nature than his first cause of action; if the action were real, he had a *scire facias*. But in this case of ejectment, if after the year he could not have an *habere facias possessionem*, he was without remedy; for it being a personal action, a *scire facias* did not lie before the statute, and he could not have a new action upon his judgment; so he had no manner of advantage of his judgment if he had passed the year and day;

(a) *Cro. Eliz.* 706. 5. *Co.* 88.

(b) See *Cole's Case*, 2. *Keb.* 55.

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which was very absurd. And the reason of a *scire facias* in a real action at the common law was, for that the party might have a release or other matter to plead; and it was thought hard in such case to suffer execution to be without an opportunity of pleading, because thereby the freehold is not only divested, but the party put to an action of an higher nature, which sometimes the nature of his case does not allow of. But that reason holds not in ejectment, for the worst that can be is, to bring a new ejectment, which is determined within the half-year at most. He said, it was a common course of mortgages, for the more speedy getting possession, to give judgment in ejectment; yet if, after the year, he should be put to his *scire facias* upon such judgment, it could be of no great use to him. And he said, that after judgment one might enter and execute his own judgment; and that the assistance of the sheriff was only to keep the peace. 2. Sid. 156. 1. Ro. Rep. 313. Noy, 71. Palm. 363.

* [67]

* HOLT, Chief Justice. As to the taking of judgment in ejectment by a mortgagee, it is a thing not to be much encouraged, and I never knew anybody use it but one; and what difference can there be between this and a real action? for *quoad* the term and possession, it is real. At common law, if one had a term of twenty years to come, and were turned out, his remedy was *ejectment*. As *assize* or *writ of right* was for a *disseisin* of the fee-simple or freehold, so *ejectment* was his remedy when ousted of his term, and a recovery in ejectment bound the term and right of it; for if there were a recovery by A. against B. it bound him, and he could not falsify it, but the recovery made him a good title; and so in ejectment, a recovery made a good title; and neither the party against whom it was had, nor his heirs, could falsify it. Now if the recovery were in a real action, you cannot sue execution until after the year without a *scire facias*. And why not so in an ejectment? For if you have a judgment, and you let it lie still a year and a day, and it be not hindered by a writ of error (for in such case, if the plaintiff be nonsuited, or the writ abate, or judgment be affirmed, he may have execution without a *scire facias*), you shall not execute it after the year without a *scire facias*. And as to the statute of *Westminster the Second*, he said, he was not satisfied with Coke's inference from it, that no *scire facias* did lie upon a judgment in a personal action; for that does not seem to have been so; for the statute begins with its enumerations where it gives a *scire facias*. First, Of records before such as had power to take such records as recognizances, and then fines executory, *five contractus, five conventiones, five obligationes, five servitia aut consuetudines recognita, five alia quæcunque irrotulata, &c.* *Vide* 1. & 2. Co. and many other books. By Coke's own rule, where one begins a graduate enumeration of particulars, and concludes with these general words, *et alia*, the general words shall comprehend nothing but what is of an inferior nature to the first degree or particular of his enumeration; and here to bring in a judgment had in the court above under the *et alia* would be contrary to that rule. But

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* [68]

Ante, 3.

Ante, 39.

Post. 94.

Ld. Ray. 693.

766. 849. 869.

* [69]

But without doubt it lay at common law in real actions; and why should the law differ in the case of ejectment from any other case? I can find no reason for it. The party has delayed himself by not suing execution in time; and the right of a term is as much bound by a judgment in ejectment as the right of land is in a judgment in a real action * concerning the freehold or inheritance, and none can falsify such recovery, or recovery in a real action, but the issue in tail by the statute *De Donis*; and that only indirectly, as by saying that it was by default, if the truth be so; but he cannot directly falsify it in the point tried; as that there was a faint title and no evidence; but a stranger to a recovery in a real action may falsify, and so he may in ejectment: and I see no inconvenience to put them to a *scire facias*, and I do believe it is not usual; for either the party takes execution presently within the year, or he is delayed by writ of error; if the latter, he may have execution after the year, or he has sued execution within the year, and continued it by a *vicecomes non misit breve*. If there be two plaintiffs in a personal action, and one of them dies, that shall not put the other to a *scire facias*, or if one of the defendants die; therefore likewise a *scire facias* is not necessary, because the same party still remains on record; and this has been lately adjudged upon solemn debate here (a). I doubt whether, if there be a real action, and judgment thereupon, and the tenant dies within the year, whether there can be execution there without a *scire facias*, though it be within the year: and I do not know any authority in point of it: in personal action he shall not, because execution is had against the party defendant, and you say in the writ *feri facias de bonis et catallis* of the defendant, which cannot be after his death; or *capias* his body, which cannot also be after his death. An *elegit* is *de terris tenementis bonis et catallis* of the defendant: but in real action you say nothing but *habere facias seisinam*; therefore it seems to me, that execution may be there had within the year, though tenant die, without a *scire facias*; and therefore you see *Shelly's Case*, where the tenant died in the morning the common recovery was had; but that case does not come up to my purpose, because there the writ of execution might be *tested* of that day. If in personal action execution be sued out, the death of the defendant shall not bar the execution of it; but if it were not out, there must be a *scire facias*. But if demandant die within the year and day, there must be a *scire facias*, because they are other parties who sue the execution; and, whether in ejectment after death of defendant within a year you can sue execution without a *scire facias*? is the question. But it seems you may; because in the writ of *habere facias possessionem* you do not say against whom the execution is to be had, but it is only to * have the possession; but after a year and day there ought to be a *scire facias*, not only against the defendant, but also against the terre-tenants.

(*) See Moor, 367. Carth. 112. 193. 330. 1. Show. 408. and Tidd's Practices, 1. Ld. Ray. 244. 1. Salk. 319. 5. Mod. 723.

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WITNESSES
against
HARRIS.

POWELL, *Justice*, agreed, that there ought to be a *scire facias*, and that there was no difference between this and other cases; but as to *Coke's* opinion upon the statute of *Westminster the Second*, that before the statute it did not lie in personal actions, he said, the law had been so taken ever since: and he said, the judgment in ejectment is not of *the possession*, but of *the term*; and it was the highest writ a lessee for years could have; and in a writ of annuity there must be a *scire facias* after the year at common law; but he agreed, that if a writ of error be brought and superseded, or the plaintiff be nonsuited, or it abate and judgment be affirmed, there, after the year, a plaintiff shall not be put to a *scire facias* to have execution. And he said, that in the common pleas they never took possession upon a judgment in ejectment without a *scire facias* after the year: and he said, where one took judgment in ejectment for security of his mortgage, he may secure his execution after the year, by taking execution out within the year, and entering *vicecomes non misit breve*: and this he said was my *Lady Allibon's Case* (a).

Of this opinion were the other two Judges.

Ante, 5. 7. 50.

HOLT, *Chief Justice*, declared, that he submitted to *Coke's* opinion, though he saw no reason for it. And he said, that a writ of error did not supersede the possession, or hinder the party of his entry, if it were lawful before; it does indeed lie upon the hands of the Court, that they cannot award execution; but the party may enter if he will; and that has been lately resolved in the case of *Badger v. Lloyd* (b).

The execution was set aside as irregular, and restitution granted (c).

(a)

(c) See S. C. post. 177.

(b) Holt, 199.—And see Taylor v. Cole, 3. Term Rep. 293.

Case 104.

Newson against Bawldry.

The Court will direct a plea to a declaration in prohibition to be amended, in order to bring the question to be tried regularly before the Court.

* [70]
S. C. Sett. &
Rem. 259.
Post. 121.
2. Salk. 164.
Ld. Ray. 39.
2. Pr Wms. 125.
Sera. 576.

DECLARATION IN PROHIBITION for libelling in the spiritual court for the payment of a parish-rate, made at an assembly of twenty parishioners, fifteen whereof were against the rate, and five only for it; and that the money was expended in repairing THE CHANCEL and railing it, and raising the floor some steps higher.

It was pleaded, that THE COMMUNION-TABLE was, *ab antiquo*, placed in THE CHANCEL, and that there were ancient rails about it which were out of repair; that at a meeting of a majority of the parishioners the rate was made to replace THE COMMUNION-TABLE in THE * CHANCEL, and to repair the said rails: the plea also contained some other things which were thought decent to be done at that assembly.

But

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But the matter being ill pleaded, they were directed to amend their plea, in order to bring the following points in judgment:

NEWSON
against

BAWLDAY.

FIRST, Whether if the communion-table were not in the chancel before, or if there were no steps up to it, and the parishioners on a meeting do not find that so decent, the majority of them can make a rate to oblige all for altering the place of the communion-table, or carrying it into the chancel, or for raising it higher?

The majority of parishioners at a vestry may bind the whole parish in removing the communion-table,

1. Salk. 164.

3. Com. Dig.

"Eglise"

(G. 2.).

And THE COURT inclined they could; for as to the degrees of order and decency there is no rule, but as the parishioners agree among themselves; and though they are compellable to put things in decent order, yet there is no rule for the degrees of decency but the judgment of the majority.

SECONDLY, Whether a majority of parishioners may make a rate to bind the rest for repairing or adorning THE CHANCEL? for that is the special freehold of the parson.

Quære, Whether the vestry can make a rate to repair and adorn the chancel of the church.

2. Inst. 489.

1. Salk. 165.

2. Roll. Abr. 337.

Hob. 66.

3. Mod. 264.

3. Burr. 1689.

CHESHYRE here quoted the case of *Rose v. Hawkins* in this court (a), where a libel was for a parish-rate to repair a church and chancel, and a prohibition granted for two reasons; one, because the chancel ought to be repaired by the parson; the other, for that it was suggested the rate was not made by a majority; yet because they had not gone to try that point below, THE COURT said it was no cause.

(a) 9. Will. 3.

Fenwick *against* Gravenor.

Case 105.

FENWICK, pretending the defendant to be his wife, delivered ejectments to the tenants, and she, denying the marriage, prayed to be made defendant.

A wife may be made defendant in ejectment, where a pretended husband is lessor of the plaintiff.

It was opposed by the plaintiff's Counsel, for that if she should have judgment he would lose his costs, since he could have none against his wife.

S. C. post. 121.

156.

S. C. 1. Salk,

257.

S. C. 2. Salk,

650.

S. C. Holt, 269.

Post. 121. 156.

Salk. 6.

HOLT, Chief Justice. It is due of right to the tenant in possession and landlord to be made defendants; for otherwise the tenant in possession might combine with the lessor of the plaintiff and oust the landlord of his rent (a); and to deny the lady that right would be upon the presumption of her marriage, which would be directly to determine the point in question; and there is no inconvenience of the other side; for the plaintiff, if he * has judgment, may have costs against the tenants in possession.

* [71]

(a) And see 11. Geo. 2. c. 19. s. 12. 3. Burr. 1301. and Runnington's Ejectments, 2d edit. 163.

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Case 106.

Shortridge against Lamplough.

Entered in C. B. Michaelmas Term, 10. Will. 3. Roll 659.

In B. R. Trinity Term, 12. Will. 3. Roll 454.

If a reversioner bargain and sell the lands leased, and then release his interest in the reversion, such release shall be intended to be to the use of the releasee and his heirs, although no consideration is expressed for the release, nor any express uses limited thereon.

S. C. 2. Salk.

678.

S. C. 3. Salk.

386.

S. C. Holt, 621.

S. C. 2. Ld. Ray.

798.

S. C. Lutw. 351.

Gib. Uses, 270.

Poph. 47.

Moor, 688.

2. Atk. 148.

1. Vern. 40.

141. 415.

Ld. Ray. 155.

160. 235. 289.

801. 854. 876.

Fitzg. 301.

9. Mod. 176.

Stra. 934.

2. Fenbl. Eq.

138.

Saund. on Uses,

133.

ERROR OF A JUDGMENT in the common pleas, in an action of covenant upon a deed of the lessee, brought by the assignee of the reversion.

The covenant was to build several houses on the premises.

The case was this: *Thomas Astley*, seized of the reversion of the lands leased, did bargain and sell the same to *John Griffiths* for a year, in consideration of five shillings in hand paid; and afterwards released all his right, title, and interest in the reversion to *John Griffiths* and his heirs, but did not shew that there was any consideration for the release, or that there was any express uses thereon limited.

IT WAS URGED by the defendant, that the release must have enured to the use of the releasor, and by consequence the plaintiff has no title to the reversion, and by consequence not to this action.

And for this cause, there was a demurrer to the declaration, and a judgment for the plaintiff, and a writ of enquiry executed, and final judgment in the common pleas.

And A WRIT OF ERROR being brought,

RAYMOND, for the plaintiff in error—After uses came to be practised in the time of *Edward the Fourth* and *Henry the Sixth*, during the quarrels of the families of *York* and *Lancaster*, and all along until the time of *Henry the Eighth*, the state of the land and the use were two several things, and one might divest himself of the estate and keep the use, or *vice versa*, or give the estate to one, and the use to another; and if he had made a conveyance of his lands without a consideration, or any express use limited, the conveyance was to his own use; and this was the law until 27. *Hen. 8. c. 10.* as appears both by practice and the authority of books. The question then will be, What alteration the statute of *Henry the Eighth* has made? The intent of that statute was to destroy uses, by drawing the possession to them and not them to the possession, so that since that statute the use draws the legal estate to it (a). If a man at this day make a feoffment in fee to another and his heirs generally, without declaration of use or consideration, it shall be to the use of the feoffor; so of fine or recovery, and all other conveyances. *Vide Dyer, 146* in point, in the case of a feoffment; for he says, if there be no consideration * appearing, or use expressed upon a feoffment, it shall be intended to be to the use of the feoffor (b). When one makes a feoffment to particular uses,

* [72]

(a) See 1. Co. 125. 2. Bl. Com. 333. 20. *Castle v. Dodd*, Co. 58. *Latch, Saunders on Uses, 125. 127.* 82. in *Recovery*. *Palm. 462. Co.*

(b) See 2. Roll. Abr. 781. *Cro. Jac. Lit. 23.*

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so much of the use as he does not dispose of remains in him as his old use: and he said that there was no difference when there were particular uses limited and no use at all; for what draws the use out of feoffor? It is either the consideration, or the expressing it to be to the use of another; and that reason holds in both cases, whether of a general feoffment or a feoffment with particular uses. In the case of *Godbold v. Freestone* (a), held that there was no difference between, where one seised in right of his mother makes a feoffment in fee to the use of himself and his heirs, and where he makes it generally without limiting any use, for that in both cases he shall be in of an estate descendible to the heir of part of the mother, for in both cases the old use remains still in him; and the same rule will hold in this case of a release, without any consideration or express use; the old use will still remain and be in the releasor, because the use and estate are distinct, and though the estate pass, the use does not, without a consideration or express limitation of it; and they are as much distinct things in a release, as in any other conveyance: and the precedents are, that when a release is pleaded, there always mention is made of a consideration or express use (b). There are indeed many cases, where they were not so pleaded; but they passed *sub silentio*, and therefore not to be regarded specially, being against the reason of the law. In the case of *Edwards v. Morgan* (c), covenant was brought by an assignee of a reversion, to which grant the tenant attorned for non-payment of rent; and the book says, that judgment was stayed for an apparent fault in the declaration, because it was not said to whose use the reversion was, or any consideration of the grant mentioned; and this he relied on, as an authority in point.

SHORTIDGE
against
LAMPLOUGH

BUT NOTE, The case in the book mentions the grant to have been upon consideration mentioned in another deed, which deed not appearing was considered as if there had been no consideration at all; and then it appears to be the intent of the party, that there should be a consideration; which not being, it cannot be thought that his intent was to pass it without any consideration.

* It is objected, that a release enures by way of enlargement of estate, and a lease and release make but one conveyance in law; so that there being a consideration, that shall run through, and be communicated to the estate enlarged. But in answer; Surely they are distinct conveyances; the one operates by the statute of Uses, the other by the common law; they are indeed so far one conveyance, that the whole estate passes by them both, and the estate for years is merged and gone by the release coming upon it, being to the same person; but indeed if the release were to the use of another, or returned back to the releasor, the estate for years would not be merged, because of the saving in the statute of 27. Hen. 8. c. 10. saving rights of other persons.

* [73]

Lease and re-
lease.

(a) 3. Lev. 406.

(c) 3. Lev. 233.

(b) 2. Saund. 11. 277. 2. Vent. 120.
Co. Ent. 264. 220. 474.

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SWORTHPOLE
against
LAMPLOUGH.

* [74]

WELLS *contra*. He agreed, that in all sorts of conveyances, if there be not a consideration or use expressed, or necessarily implied, the use shall remain in the conveyancer, and shall draw back the estate to it (a). The intent of the parties is most to be considered in the raising of uses; and therefore if there be but a penny paid by him to whom the conveyance is made, it will raise the use to him, without any declaration; not so much for the consideration, as that the payment of the penny shews the intent of the parties to be, that he who gives the penny shall have the use (b); for there can be no reason why a man should give even the least sum of money to another, to make a conveyance of his estate, to have it back to himself again. So if a feoffment be with intent to make one a tenant to the *præcipe*, to have a recovery suffered against him, the tenant to the *præcipe* shall * have the estate to his own use, otherwise he could not be right tenant to the *præcipe*, to have a recovery suffered against him; and the design of suffering the recovery, was the intent of the party at the time of the feoffment. Nothing passes by a *release* to the lessee in possession, but by way of enlargement of the estate of the lessee; for it does not operate to give a new estate of the reversion, but to encrease the estate in possession according to the words of it. So it does not work by merger of the first interest, but by enlarging of it: but it is true, that after the release, the lease does not exist distinct from the estate by the release; for though it do not continue as a term, yet it is part of the interest that he now has in him by the release; for it is not like a grant to a particular tenant by him in reversion, which drowns the particular estate. So that if the release enures only to enlarge the estate, the interest enlarged must be to the use of lessee for years, or it cannot be said to be an increase of it; and indeed, if the practice had not prevailed to the contrary, it were very odd to limit the use of a release to any but him who has the lease. It is for that we find the clause in leases, on which the party intends to build a release, that the intent of the lease was to pass an estate by release upon it, for the benefit or use of a third person. It would be absurd to say, that my conveyance should have no other operation, but to extinguish or merge the estate that the grantee has already, to have it brought back to me; and what need could there be of such a way? If the party had any such intent, it might be soon done by *surrender*. If it had been expressed in this deed, that he had already made him a lease for years, and that for the enlargement of that estate he made this release, there had been no doubt but that the release was to his use; and there is no difference between the cases, since this release in its own nature enures by way of enlargement. Besides, here is also a valuable consideration; for the lease and release being but one conveyance, the five shillings that are the consideration of the lease shall be participated to the release; and also the acceptance of the release is in its own nature a release, for it implies an

(a) See Lloyd v. Spillet, Bar. E. R. 384.

(b) See Salk. 676. Holt Rep. 736, 737. Moor, 248. Dyer, 166.

alteration

alteration of the estate of the lessee, which to consent * to is a consideration moving from lessee; and the only motive of the lessee's parting with the old estate was to get a new one. He who takes a release by way of enlargement of estate must not only have the interest, but also a privity of estate between him and the releasor. If *A.* make a lease to *B.* and he make an under-lease over, and *A.* releases all his right to the under-lessee and his heirs, it is void, as to enlarge the estate for want of privity (*a*); so that it is a privilege inseparably incident to him who has a privity in estate to be capable of a release of enlargement; and that is so for the benefit of releasee.

SHORTRIDGE
against
LAMPLUGH.

RAYMOND said, the first lease could not be said now to have continuance; for after the lease, if the lessor before the lease had suffered judgment and released, the judgment would have attached before the release.

MOLT, *Chief Justice.* The question is, Whether the statute of 27. Hen. 8. c. 10. has altered the ancient way of pleading? For this manner of pleading was good before the statute, without doubt; and it appears by many precedents since the statute, that this way was used, even in the case of a *feoffment*: and it was thought sufficient to alledge the estate in the feoffee, without any more. A feoffment in fee was pleaded, *virtute cujus* he was seised without any more ado (*b*); and so there are many other cases since the statute in *Coke's Entries*, though there be no consideration or use expressed; yet it does not follow that it is to the use of the feoffor, for that is matter of fact extrinsic to the deed. If since the statute of *quia emptores terrarum*, a feoffment were made by * deed, without consideration or use declared in the deed; yet the use might be declared by parol, until the statute of 29. Car. 2. c. 3. of Frauds and Perjuries; and even since that statute, it may be declared by writing only without seal. Now for us to construe a deed to be to the use of feoffor, when it might be to the use of feoffee, for anything that appears, would be very odd, therefore we shall intend it to be to the use of the feoffee, if no more appear; and if it were not so, it ought to come on the side of the feoffor or grantor, by averment that there was no use limited to the feoffee, that is to confess the feoffment when it is pleaded; but to avoid the effect of it by averment, and especially in case of a feoffment or release to a feoffee or a releasee and his heirs, without limiting any particular use; for if it be not taken to be to the use of feoffee or releasee, the conveyance cannot be of any use at all; for it cannot be thought, that one would be at the trouble and charge of any of these conveyances, to be seised just in the same manner as he was before, and of the very same estate; for if he had a warranty to the first estate, he shall have advantage of it, if he should be impleaded for the resulting estate: if he were seised as heir of the part of the mother before, he would be so after; but before the statute of *Henry the Eighth* such conveyance might

Question and
opinion upon
the pleading,
and touching
uses.

(a) Co. Lit. 273. a.

(b) Plowden, 478.

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against
LAMFLOUGH.

be of some use, though no use were declared upon them, *videlicet*, to cheat the lord and hinder tenants to *præcipe's* from being known, &c. But now it cannot be intended to have been to any other purpose but to pass the use and estate, where there is no alteration made, and therefore it shall be intended to the use of the feoffee, &c. if the contrary be not shewn on the other side by averment: and the authority in *Coke upon Littleton* does not contradict this; for it says, "where there is a feoffment in fee made, and some particular use limited, so much of the old use as is not limited over remains in him, as his old use;" for there it appears by limiting the particular use, that the feoffment was made to another person, than to grant an estate to the feoffee, TO WIT, to raise the particular use; but where there is no reason appearing, it shall be intended to the use of the feoffee, if the contrary be not made out on the other side.

• [77]

POWELL, *Justice*, *ad idem*. And he said, that he was not satisfied that the nature of the conveyance would admit of a resulting use; for though it be a conveyance much used now, to raise uses upon to a third person by express words, yet in strictness it is a common-law conveyance. And if a lease be made for forty years, and a release thereupon without consideration or limiting of any uses, surely it cannot be intended to be to the use of the lessor; for the very extinguishing the estate of the lessee is a good consideration; and suppose it were a confirmation, surely it would be the same.

BUT THE CHIEF JUSTICE and HE said, that if there were a particular use limited on the release, the rest would result back.

GOULD, *Justice*, said, that he himself had taken the like exception in the common pleas, in the case of *Reginald and Bishop of London v. Pratt (a)*, but was over-ruled by the whole Court; and he quoted *Lit. fo. 267. Vaughan, 44. Lit. 3. 459.*

The judgment was affirmed.

A writ of enquiry may recite the declaration *in hæc verba*.

RAYMOND farther took exception to the writ of enquiry; for he said there was a *variance* on which the judgment was, and that recited on the writ of enquiry; and therefore it cannot be a right of enquiry, nor a writ of enquiry for their judgment. The writ of enquiry does not set it out *in hæc verba*, but by way of recital; and then it recites all in the present tense, instead of the preterperfect, as it ought; and they give damages to the *tesse* of the writ of enquiry, when there ought to be enquiry to the time of the action brought: and he compared it to the case of *Saund. 169.* where the verdict gave damages for loss of service after declaration brought, and for this the judgment was reversed (*b*).

(a) 7. Will. 3. Roll 430.

(b) See Hob. 189. and the case of *Parce v. Mellen*, in Trinity Term,

9. Will. 3. 2. Show 41. 82. Ld. Ray. 1382.

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HOLT, *Chief Justice*. You would have the writ of enquiry bad, because you say it gives damages to *the teste* thereof, when it should only be to the time of declaration or bill. The writ directs the sheriff to take inquisition what damages the plaintiff had by virtue of the breach of covenant, and not for the houses being out of repair at the time of the action brought. Suppose the houses were out of repair at the time of the action brought, and become more out of repair before judgment, and writ of enquiry, the jury that enquires ought to give the party, not such damages as would put them in repair at the time of the action brought, but such as would be enough to put them in repair at the time of the enquiry.

SHORTLAND
against
LAMFLOUGH.
Ld. Ray. 4. 411.
536. 1125.
8. Mod. 243.
Stra. 1131.
Gilb. Eq. Rep.
195.

Goodwin against Hilton.

Case 107.

THE ATTORNEY-GENERAL alledged, and it was not denied by THE COURT, that before the two *scire facias*'s returned, the bail may discharge themselves by render of their principal.

Bail may render the principal before return of *scire facias*.

Cro. Eliz. 618. 1. Ld. Ray. 157. 6. Mod. 238. 8. Mod. 340. 1. Wilk. 270. 1. Stra. 193. 4. Burr. 2134. 5. Term Rep. 534. Tidd's Pract. 144.

PER HOLT, *Chief Justice*. The *reddidit se* cannot be entered upon the bail-piece; for the *scire facias* is grounded upon that, and the *reddidit se* would destroy it; but the remedy of a bail is upon an *audita querela* to be grounded on the *reddidit se*.

Reddidi se cannot be entered on the bail-piece.
S. C. post. 97.

Arg. 51. 6. Mod. 132. 231. 238. 309. Comb. 4. 2. Show. 79. 147. 338. 443. Ld. Ray. 156. 721. 1097. 1177. 1452. 1467. 8. Mod. 194. 240. 280. 305. Stra. 419. 443. 781. 872. 1270.

And PER CURIAM, If the render appear to be fraudulent, though it has the outward show of a real one, that will not discharge the bail, as if there be a previous agreement to let him escape, while he should remain in custody of THE TIPSTAFF.

A fraudulent surrender will not discharge the bail.

Bar. 70.
Seldon's Pract. 182.

And it was offered at THE BAR, to have been ruled in the case of *Lee v. Knipe (a)*, that the principal ought to be two days in custody, before an entry should be made of a *reddidit se*.

When the *reddidit* shall be entered.
Tidd's Pract. 155.

And here it was agreed PER CURIAM and THE ATTORNEY-GENERAL, that the bail may render their principal pending a writ of error, though during that time the plaintiff cannot charge him in execution.

Bail may render pending error.
Tidd's Pract. 144.

But see the case of *Wickstead v. Bradshaw (b)*, which was quoted *contra*.

(a)

(b) Hob. 116.

The

Michaelmas Term, 1. Queen Anne, In B. R.

Case 108.

The Queen against Smith.

In a conviction for stealing deer in the king's forest, it is not necessary to shew in what capacity THE KING is seised of the forest, for he is presumed to hold all his property in right of the Crown.

* [78]

S. C. 1. Salk. 377.
Post. 129.
2. Salk. 147.
182.
6. Mod. 83.
Ld. Ray. 582.
2. Vern. 441.

In an information for hunting deer in a forest, it is sufficient to state generally that it was without the consent of the keeper.

Ld. Ray. 584.

CONVICTION on the statute of Deer-stealing in the king's forest of *Rockingham*.

The killing was in the time of *King William the Third*, and the conviction in the time of *Queen Anne*.

* BRODERICK objected, that it was necessary to shew in what capacity the king was seised of the forest; for by the statute, a third part of the penalty is given to THE KING. And therefore if the king was seised in his *natural capacity*, it ought to go to his executor; if in his *politic capacity*, it ought to go to THE QUEEN.

HOLT, *Chief Justice*. The king can have nothing in his natural capacity, if it be not in right of his *Dutchy* (a), or an estate-tail by the statute of *Donis* (b); for if the king purchase lands to him and his heirs, he shall have it in his *politic capacity*. And wherever the king is said generally to be *seised*, it shall be intended a *seisin jure coronæ*, and Dutchy-lands would now be in the queen, if they were not kept separate by act of parliament (c). And if the queen should create a *Duke of Lancaster* at this day, he would not of consequence have the Dutchy-lands: and further, it is not material upon the conviction or judgment who shall have them.

ANOTHER EXCEPTION was, that the conviction laid the killing to be in the forest of *Rockingham*, where deer were usually kept, and without the leave or consent of any intrusted with the keeping of the said forest or the said deer; and a forest has many walks and officers, and it ought to exclude the leave and consent of any of them.

HOLT, *Chief Justice*. It has been indeed held, that Judges are not bound to take notice of the law of the forest *ex officio*; but I know no reason for that. But if you had leave of any particular keeper of any particular part of the forest, you could not be found guilty; for leave of a deputy is leave of a principal.

And the conviction was affirmed.

(a) Dyer, 209. pl. 22. Plowd. 212. 223.

(b) See Co. Lit. 15, 16.

(c) The lands and possessions of the *Dutchy of Lancaster* are separated from the Crown by a charter of Henry the

Fourth, made by authority of parliament. 1. Keb. 643. T. Raym. 90. Plowd. 214. Lutw. 1235. See also the statutes 27. Hen. 8. c. 11. 27. Hen. 8. c. 16. 2. & 3. Philip & Mary, c. 20.

Case 109.

Rigaut against Gallisard.

Trinity Term, 1. Anne, Roll 121.

The spiritual court cannot take cognizance of solicitation of *ebashery*, if the offence was accompanied with such force as will maintain an action of assault and battery at common law.—S. C. Holt, 597.

S. C. 2. Salk. 552. S. C. 2. Ld. Ray. 809. 2. Inst. 437. Ld. Ray. 103. 1101. 8 Mod. 114. Stra. 187. 471. 545. 576. 823. 1100:

upon

DECLARATION UPON A PROHIBITION, that at the sessions of the peace held at *Westminster* such a day and year of *King William the Third*, the plaintiff was indicted for making an assault

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upon one *Louise Rigaut*, the defendant's wife, with intent to have a carnal knowledge of her; and it was laid to be *against the peace* of the late king, &c. and that likewise the now defendant brought an action of assault and battery against him in *Trinity Term*, in the twelfth year of the late king, which was likewise laid to be *contra pacem*, which suit is still depending; and yet the said defendant has ordered him to be sued in the *Bishop of London's court*, for solicitation of the said *Louise Rigaut's* chastity to commit adultery with him.

RIGAUT
against
GALLISARD

* The defendant pleads for a *consultation*, that he is not charged below for any of the crimes charged in the indictment or action. * [79]

And to this plea there is a demurrer.

MOUNTAGUE for a *consultation*. This is a matter whereof they have proper conusance; for by THE LIBEL it appears to be *crimen incontinentiæ* in the particular of soliciting a married woman to commit adultery with him. The words of the statute of *Circumspetiti Agatis* are, "*non puniendo eos si placitum tenuerint, &c. de his quæ sunt merè spiritualia, viz. de correctionibus quas prælati faciunt pro mortali peccato, viz. pro fornicatione, adulterio et hujusmodi (a).*" And it appears by the word "*hujusmodi*," that they have conusance of things of less nature than fornication, as *solicitation of chastity*; and of higher, as *incest*. And the reason is, that the common law takes no notice but of facts committed, whereas the civil canon law punishes intentions if wicked; and they go upon THE RULE, that "a man must not look after a woman to lust after her;" for if they will carry that desire further, as to endeavour, though by fair means, to put their desire in execution, they will punish them.

SECONDLY, The question is, Whether the indictment and conviction for the assault and battery, and the action depending, will alter the case? They are several prosecutions in their nature and design: The *indictment* is to entitle the king to a fine for the breach of his peace, and ill example to his subjects in the assault; and the end of *the action* by the husband and wife, is to recover damages for the particular injury done to them; and for each of these, the punishment is corporal or pecuniary: But *the suit* below is for reformation of his manners and salvation of his soul; and if he be convicted below, he is only to do penance, which by commutation may be changed into money, as the statute of *Circumspetiti Agatis* allows; and an action may be brought in this court for the sum committed for (b). So the one law punishes the wickedness of the mind; the other, wicked acts; as in case of laying violent hands upon a clerk (c). And the maxim of "*nemo debet bis puniri pro eodem delicto*," does not hold in this case; for that is to be un-

(a) 2. Inst. 487, 488.

(b) See the statute *Aricali Cleri*, c. 6.

"Quando eadem causa diversis rationibus

"coram iudicibus ecclesiasticis et secularibus,

"ventilatur." 2. Inst. 622.

(c) See the Case of *Usury*, 2. Inst. 442.

. derstood,

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against
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derstood, that a man * shall not be twice punished in the same manner as gives damages twice, or be twice fined upon an indictment. As if a man bring *trespass* for *maibem*, and recover damages, he shall not after have an *appeal*; for the first recovery may be pleaded in bar to it; and the reason is, because both tend to have damage (a). If A. steal the goods of B. and he bring *trespass* for them, and is barr'd, yet he may bring his appeal of felony for those goods. By the statute of 7. Jac. 1. c. 4. every lewd woman that has a bastard chargeable upon the parish, is to be put to the house of correction and punished for a year, yet she may notwithstanding be punished in the spiritual court: So if a man find another man in bed with his wife, he may have an assault and battery against him and recover damages; and he shall be likewise punished in the spiritual court for adultery (b).

EYRES *contra*. One is not punishable in the spiritual court for a solicitation of chastity, where there is force used to gain that, though he be in case of a solicitation only; for the force gives such a temporal mixture to the offence as ousts them of jurisdiction (c). A matter merely spiritual is where there is no mixture of the temporality (d). Fornication, when by consent of parties, is within their consueance, and so is solicitation; but if one will go farther and use force, which, if perfected, would amount to a *rape*, and by consequence felony, they have no pretence; for the solicitation and force being at the same time, make an entire offence punishable at the common law.

Now, as to have one crime punished here and there, the laying of violent hands upon a clerk is within the express words of the statute of *Circumspiciendi Agatis*, punishable there, after it is punished here, but not before, *Fitzherbert* says (e), that if they proceed sooner, a prohibition will lie. A suit was instituted in the spiritual court for these words, "You are a bawd, there were two couple abed in your house (f); and a prohibition was granted upon a suggestion of an action depending for the same words at law.

HOLT, *Chief Justice*. The prohibition ought to stand; for it was but one intire act, and they below cannot divide it: for the plaintiff in the prohibition has averred the fact for which they are indicted, and that for which the suit is below, to be the same; * and to give them jurisdiction below, you should have come and rejoined, and traversed its being the same fact; but that it was for other cause than is in the indictment, and that perhaps would have divided it. And he put this case, which he said had been adjudged in my LORD HYDE's time: The libel below was for saying the prosecutor had a *bastard*; the defendant comes and suggests for a prohibition, that he accused the plaintiff below, before

(a) 4. Co. 43.

(b) Sir Philip Coot v. Bertie. Duke of Norfolk v. Sir John Germaine.

(c) 2. Inst. 483.

(d)

(e) Fitz. N. B. 430.

(f) Palm. 379.

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a justice of peace, of getting a *bastard-child*, and that the justice adjudged him to be the *reputed father* of it; and that he spoke the words before the justice; and it was replied, that they were spoke at large, and no otherwise than before the justice of peace; and to this it was pleaded by way of *estoppel*, that since he had been adjudged before the justices to have been the father, he could not sue below for defamation; and of that opinion was the Court. Here you should say, that it was for another offence than the solicitation in the indictment; or that it was at another time and place than is laid in the indictment; and their laying, in THE LIBEL, another time and place than is in the indictment, is not enough; for below they lay at what time and place they please. If a man solicit a woman, and go gently to work with her at first; and when he finds that will not do, he proceeds to force, it is all one continued act, beginning with insinuation and ending with force. And in the case of the *Duke of Norfolk v. Germaine (a)*, it was not pretended to be force; and an indictment will not lie for a plain adultery, but a libel below will; though the law indulges the husband with an action of assault and battery for the injury done to him, though it be with consent of his wife, because the law will not allow her a consent in such case to the prejudice of her husband, because of the interest he has in her: And he compared it to the case of calling a woman "a whore and thief;" there she shall not split the words and punish him below for calling her "a whore," and at law for calling her "a thief." He agreed, that if adultery be committed with another man's wife, without any force, but by her own consent, though the husband may have assault and battery, and lay it *vi et armis*, yet they shall in that case punish below for that very offence; for an indictment will not lie for such an assault and battery, neither shall the husband and wife join in the action at common law; and therefore they proceed below either civilly, that is, to divorce them; or criminally, because they were not criminally prosecuted above; and the true action for the husband in such case, is a special action, *quia* the defendant his wife *rapuit*; and not to lay it *per quod consortium amisit (b)*.

RICAUT
against
GALLISARD.

* [82]

3. Peer Wms.
269. 273. 276.
Ld. Ray. 1031.
1208.
Stra. 61. 977.

THE COURT acc. for that the offence is not merely spiritual.

(a) 8. State Trials, 27.

(b) See Rastal's Entries "Trespass."

The Queen against Cantuell, alias Sangway. Case 110.

THE DEFENDANT was excommunicated below, *pro jactitatione maritagii*, and taken up upon a fifth process of *excommunicato capiendo*, in which there was a proclamation with a penalty. And being brought up by *habeas corpus*, and the writ of *excommunicato capiendo* being returned, that is, the writ on which she was taken;

If in ex. com. a copias with a penalty issue, where it ought to be a copias only, the Court will discharge the penalty but Post. 112.

not abate the writ.—S. C. 1. Salk. 254. Ante, 56. Post. 112.

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THE QUEEN
against
CANTUELL,
ALIAS
SANGWAY.

CHESSHIRE took exception :

FIRST, That this being none of the nine cases specified in the statute 5. *Eliz.* c. 23. it ought to have been a simple *capias*, and not a *capias* with a penalty.

PER CURIAM. All we can do is to discharge the penalty.

SECONDLY, That there was no addition, as the statute requires.

PER CURIAM. This being not one of the nine cases mentioned by the statute, there needs no addition.
Addition is not necessary in a writ of ex. com. except it be for one of the causes in 5. Eliz. c. 23.—1. Show. 16. Jones, 226. Cro. Car. 197. 199. 1. Vern. 24.

Want of addition in an *ex. com.* must be pleaded.

Theo. Dig. bk. 3. c. 2.

1. Com. Dig.

“Abatement” (E. 32.). *Stra* 265. 3. Mod. 45.

An excommunication is a criminal matter, and therefore a *feme-covert* may plead alone to it.

2. Roll. Abr. 556.
Cro. Jac. 502.
Cro. Car. 90.
Stra 61. 977.
Fort. 377.

And if it had required an addition, they doubted at first, whether they could relieve her upon motion? but that it ought to be pleaded. But upon consideration, they inclined to think that they might relieve her upon motion, the fault appearing on the record before them.

It was said at THE BAR, that if a plea were necessary here, it would be a mischievous case; for here she was excommunicated at the suit of her husband, and he would not join in the plea with her.

HOLT, *Chief Justice*, answered, that a *feme-covert* may plead alone in a criminal matter, as this is; as if she were attainted of felony, she might plead a pardon: but he agreed, that when husband or wife are taken upon a *capias utlagatum*, the wife shall be discharged.

The reason of additions being required by 5. *Eliz.* c. 23. to an *ex. com.*

And he said, that the reason of the additions being requisite by the statute in the nine cases, and none other, was in order to a proclamation and penalty, * but that to an imprisonment by virtue of an *excommunicato capiendi*, there was no occasion for it.

* [83]

GOULD, *Justice*. Until the case of *Hughes v. Bender* (a), the law was held, that if one were taken upon a process of outlawry with a penalty, he should be discharged; but in that case, and since it has been held, that she ought to be discharged of the penalty only (b).

The spiritual court need not require personal appearance in *ex. com.* but may take bond for it.

F. N. B. 63.

And it was said, that they were willing to absolve her below, but that they must have her in person to give caution *de parentis mandatis ecclesiæ*.

THE COURT answered, that that need not be, for they might take a bond with a penalty reasonable from other persons, with condition that she should submit herself; though it is true, the most usual way is to take juratory caution.

(a) W. Jones, 226.

(b) *Cro. Car.* 196; 197.

And

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And THE COURT declared they could not discharge her by law, and so she was remanded.

THE QUEEN
against
CANTUILL.

HOLT, Chief Justice, here would not determine, whether the writ being with proclamation and penalty, when it ought not so to be, made the whole naught, or only quoad the proclamation and penalty.

Qu. If an ex. com. with pro. lamation and penalty is totally void.

Greenway against Freeman.

Case III.

THE STATUTE 8. & 9. Will. 3. c. 18. of two thirds in number and value was pleaded in bar, and the defendant, to bring himself within the benefit of the statute, shews, that he absconded at the time mentioned by the statute, but did not shew for what he absconded; and for this the plaintiff had judgment on demurrer.

Bankrupts.
S. C. 2. Ld. Ray.
810.
Ante, 10. 16.
Post. 96.
Ld. Ray. 764.

The Queen against Twitty.

Case II2.

MANDAMUS to swear in churchwardens. It was returned, that they were not chosen.

"Not chosen" is a good return to a mandamus to swear churchwardens.

And IT WAS HELD a good return; for if both were not chosen, the writ does not command him to swear one of them, so the return is an answer to the command of the writ.

5. Mod. 11.
Fitzg. 195.

Ld. Ray. 1495. Salk. 434. Dougl. 79, 80.

It was also held by THE COURT, that if the writ of mandamus were to swear them that were chosen generally, they might return generally that they were not chosen; but the writ setting forth specially that they were chosen debito modo, they may specially return that they were not chosen debito modo; but such a return to a general writ would be ill (a).

S. C. 2. Salk.
433.
S. C. Holt, 442.
Ante, 37.
Post. 118.
6. Mod. 89.
Comb. 105.
Ld. Ray. 138.

559. 1008. 1379. 1405. 8. Mod. 325. Stra. 145. 609. 686. 894. 1246.

(a) See the case of Bassett v. Chichester, 1. Sid. 286. that if the Court do not see cause of restitution, though there be

no good return to the writ, they will not grant a peremptory mandamus.—NOTE to former edition.

* [84]

* Hall against Hill and Others.

Case II3.

THE DEFENDANTS were Judges of a Court at Bristol, in which the plaintiff had obtained a verdict and damages for twenty-eight pounds.

An attachment lies against the Judges of an inferior court for

The plaintiff, the same day, went to the town-clerk, and got his costs taxed, he being the proper officer, and took out a capias against the principal, and, upon return thereof, a scire facias against the bail, who after the return of a second scire facias surrendered elapsed.—S. C. 1. Salk. 201. S. C. 2. Salk. 650. S. C. 3. Salk. 363. S. C. Holt, 184. 1. Salk, 148. 396. Ld. Ray. 468. 556. 766. 8. Mod. 95. 189. 208.

granting a new trial after judgment has been given, costs taxed, and a year

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HALL
against
HILL
AND OTHERS.

the principal; after which, and a year's time elapsed from the verdict and taxing of costs, the Court granted a *new trial*; which being complained of to the Court in *Trinity Term*, a rule was made for AN ATTACHMENT, *nisi*.

And now THE ATTORNEY-GENERAL came to shew cause, and alledged, that the Judges below were in no fault, for there never was any judgment entered below; and until judgment entered, the hands of the Court are not tied from granting a *new trial* at any time before judgment, if they see cause; and if they mistake that for a cause which is none, that only is an error of their judgment, for which they are not punishable (a); and though here a *new trial* was granted after a writ of error allowed, that will not alter the case; for it is frequent to have a writ of error allowed before judgment; and the proceeding against the bail was groundless, there being no judgment entered, and such proceedings did not hinder the Court's being at large to grant a *new trial*. And he quoted the case of *Tiny v. Roberts* (b), where, the plaintiff having omitted entering judgment as soon as he might have done it, the Court granted a new trial. And he said, here the Court were not bound to enter judgment without prayer of plaintiff, though an inferior court (c).

* [85]

BRODERICK and THE SOLICITOR-GENERAL answered, that the costs were taxed here by the proper officer, and that he thereupon had made out a process against the defendant; and that is warrant enough for execution, though there be not a final entry of the judgment upon THE * ROLL, which is never done in those courts until writ of error brought: where they are forced to make up the records, indeed, they sometimes enter in the margin, "judgment for the plaintiff."

HOLT, *Chief Justice*. The writ of error ought not to be allowed until judgment given, and it is a good return to it, that judgment is not yet given.

THE ATTORNEY-GENERAL confessed this as to the point of the return, but affirmed that they frequently do allow them before judgment.

HOLT, *Chief Justice*, likewise agreed, that a Judge is not punishable for an error in judgment; but he said, it is rare for the same Judges to grant a *new trial* before themselves, as here, after a TRIAL AT BAR; though that he said had been done, though never with his consent; but it is usual to grant a new trial after a trial at *nisi prius*, but that is ever after fresh pursuit, that is, the

(a) See *Rex v. Young*, 1. Burr. 556.
Rex v. Cox, 1. Burr. 785. *Rex v. Palmer*, 2. Burr. 1162. *Rex v. Jackson*, 1. Term Rep. 653.

(b)

(c) 2. Vent. 189.

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very next Term (a); but here it was granted after a year, costs taxed, and as much entry of a judgment as is in any case there, and execution taken out; and it is no excuse for them to say, they are not lawyers, for they ought to take advice of lawyers; and if they are so presumptuous as to take upon themselves the knowledge of the law, it ought not to be suffered, though there be no corruption in them. And he remembered the case of the *Steward of Windsor Court* (b), who acted both as Counsel and Judge, after bail to the writ of error brought upon his own judgment; but upon complaint the judgment was set aside, and restitution awarded. But he said, they would not grant an attachment for an error in judgment, where it is a matter within their judgment; but where it is not a matter within their judgment, as here it was not; they having already given their judgment, Why should not we grant it?

HALL
against
HILL
AND OTHERS.

And here the rule was, that the rule for a *new trial* be set aside, and the rule for an attachment discharged upon payment of expences of the complainant, and judgment entered below as of the due time,

(a) It is said S. C. 2. Salk. 650. the Court held, that a *new trial* cannot be granted by an inferior court. S. P. *Brook v. Ewers*, 1. Stra. 113. S. P. *Bailey v. Boorne*, 1. Stra. 392. But it is determined that the Judge of an inferior court may set aside a verdict for irregularity or surprize, *Jewel v. Hill*, 1. Stra. 498. or an interlocutory judg-

ment, though not irregular, in order to let the party into a trial of the merits, *Civil v. Burnasford*, 1. Burr. 571. but it seems agreed that he cannot grant a new trial upon the merits. *Blacquiére v. Hawkins*, Dougl. 379. *Rex v. Day*, Sayer's Rep. 202. *Rex v. Uring*, Fort. 198.

(b) Ante, 1.

Anonymous.

NOTE, Here it was agreed to be the course of the Court, that where, upon an affidavit made, a day is given to hear Counsel on both sides, the party may read as many affidavits as he please in corroboration of the first, and concerning the same matter, but must read none concerning new matter (a).

Case 114.

Affidavits may be read in corroboration.

Tidd's Pract. 262.

1. Term Rep. 717.

1. Will. 335. Stra. 1157. Dougl. 467.

(a) See *Rex v. Sharpness*, 1. Term Rep. 228.

Anonymous.

Case 115.

IT WAS AGREED, that the principal cannot be rendered by bail after plea pleaded (a).

Bail render the principal.

6. Mod. 132.

231. 238. Comb. 4. Post. 90. 98. Ante, 51. 77. 2. Show. 79. 147.

(a) See Tidd's Pract. 144, 145.

Case 116.

* The Queen against Parker.

Six days allowed to plead to an indictment.

INDICTMENT : To which the defendant demurred ; and upon motion, the queen had *six days* to plead peremptorily, or join in demurrer ; and within the six days their clerk in court died.

And now, after three Terms, they applied to the Court ; which told them, if they had come in any reasonable time they would relieve them.

Non prof. on indictment must be by motion.
2. Salk. 456.

And here, **PER CURIAM**, *Non prof.* ought not to be entered upon an indictment but upon motion in court, and leave thereby obtained.

Case 117.

East against Effington.

A declaration on a bill of exchange drawn, " Pay this my first bill, the second and third not being paid, &c.," and stating that the drawee " indor- savit super billam illam contenta billæ illius fore solvenda " to the indorser, is good after verdict, although it do not state that the second and third bills were not paid.

A **N** **A** **C** **T** **I** **O** **N** by the indorsee of a bill of exchange against the drawer, declaring upon the custom of merchants, and that *A.* to whom the bill was made, *indoravit super billam præd. content. billæ præd.* to him the plaintiff *solvend.*

And here it was agreed by **THE COURT** ; that " indorsement " is a term known in law, and signifies a writing on the back of a paper or parchment containing another writing.

To this declaration two exceptions were taken in arrest of judgment :

FIRST, That the words of the indorsement were not significative enough to pass the property of the bill to the plaintiff, according to the custom of merchants.

THE SECOND EXCEPTION was, That it appears there were three bills for the same sum, and that whereon the action is brought was the first, and says, " my second or third not paid, " pay this my first."

S. C. 1. Salk. 330.
S. C. 2. Ld. Ray. 810.
Post. 155.
Counb. 4. 9. 32.
152. 227. 452.
6. Mod. 29. 36.
80.
Ld. Ray. 174.
181. 281. 360.
442. 744. 757. 774.
557. 1051. 1211.

But **PER CURIAM**, However that matter would have been on *demurrer*, it will be well *after verdict* ; for if the second or third were paid, there had been no promise at all, for the promise is conditional to pay this, if the second or third be not paid ; therefore if the second or third were paid, the jury could not find for the plaintiff (a).

And as to the first exception **THEY HELD**, that that would be likewise good *after verdict* ; for without finding an indorsement,

8. Mod. 43. 265. 307. 362. 373. Comy. 57. 75. 311. Stra. 829. 648. 478.
5. Com. Dig. " Pleader " (C. 60.).

(a) See *Slarke v. Cheefeman*, Carth. 509. and *Weggeritoffe v. Keene*, Stra. 223 where it is held, that this allegation is unnecessary after judgment by default,

or on demurrer to the replication. See also *Hotham v. East India Company*, 1. Term. Rep. 640. *Collins v. Gibbs*, 2. Burr. 899.

they

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they could not find for the plaintiff (a). And it is not true to say, that at this rate, and for this reason, it may be said, if there were no manner of indorsement, that defect would be cured by verdict; for here there is a kind of an indorsement set forth, and the jury could not find for the plaintiff without finding this to be a good indorsement, and such as amounts * to an agreement to have the money paid to the plaintiff. A bill of exchange may be accepted by *parol*, but not transferred otherwise than by writing upon the back of it; and that transfers the property, by the custom of merchants. And they put the case of debt for rent, by the grantee of reversion, without shewing attornment, and helped by verdict; and so in case of bargain and sale, pleaded without enrolment, good after verdict.

EAST
against
ESSINGTON.

* [87]

HOLT, Chief Justice. If a man write on the back of a bill of exchange, "This is to be paid to J. S." or, "The contents of this bill to be paid to J. S." and set his hand to it, it will be a good indorsement.

Quare pro me. Why not a declaration of trust? But if there be no indorsement at all set forth, the verdict cannot help.

And judgment was given for the plaintiff.

(a) See *Pinkney v. Hall*, 1. *Ld. Ray.* 175.

Grips against Ingledew.

Case 118.

Hilary Term, 13. *Will. 3. Roll* 438.

DEBT UPON A DEED OF ARTICLES, whereby the defendant had agreed to pay the plaintiff thirty-five pounds for every hundred stacks of wood lying in such a wood; and so for as many more as should be felled until Michaelmas following. And the plaintiff declared for so much money as eight hundred stacks would give at that rate; and also for as much as some odd stacks more would give, in proportion to the rate of thirty-five pounds for the hundred.

On a declaration in debt on bond, by which the plaintiff agreed to sell the defendant so many stacks of wood at 35l. a stack, under a penalty of 100l, stating that he had sold him 800 stacks and some odd stacks more, &c. the plaintiff can only recover for the 800 stacks, and must enter a *remittit* for the residue.

To this declaration there was a *demurrer*, because he declared for more than the articles entitled him to; there being no agreement for anything under a hundred stacks; so he demanded more than his due, upon his own shewing.

ATCHERLY for the plaintiff took this difference: Where a man is not to recover upon his deed or evidence, but upon a matter of fact arising out of it, and inquirable by the jury, which is to be the measure of damages, then one need not expressly keep up to the very tenor of his deed; but he may enter a *non prof.* for what he demands too much, and have judgment for what is justly demanded.

S. C. 2. *Ld. Ray.* 814. *Post.* 143. 148. 1. *Saund.* 206. 282. *Hob.* 178. 2. *Salk.* 658. *Yelv.* 66. 1. *Sid.* 417. 5. *Mod.* 213. *Ld. Ray.* 152. 336. 697. 715. 735. *Burr.* 2228.

G 4

And

Michaelmas Term, 1. Queen Anne, In B. R.

GRINT
against
INGLEBREW.

* [88]

And he said, that upon this rule there had been declarations for less and more than was due, and the plaintiff had judgment. In the case of *Pemberton v. Shelton* (a), an action of debt was brought upon the statute of 2. *Edw.* 6. c. 13. for not setting forth tithes; and the declaration demanded thirty-three pounds as treble damage, the single value being eleven pounds and eightpence, as he had averred; and it was moved in arrest of judgment, that three times eleven pounds and eightpence did not make thirty-three pounds, but thirty-three pounds two shillings; so he declared for less than his demand; and that he ought not to do, without shewing * how the rest was paid: but the Court held it well upon this difference, that where the sum is certain upon the very bond or contract, without any matter *dehors* to help it, there one ought not to vary from his bond or writing without shewing how the rest came to be satisfied; but when the certainty of the demand cannot appear, but from matter of fact *dehors* of the deed or contract, which the deed or contract refers to, there, if you demand more or less than is due, it shall not vitiate. He quoted the case of *Salmon v. Smith* (b), the case of *Thwaite v. Ashfield* (c), the case of *Barber v. Pomeroy* (d); and he produced THE ROLL (e) of the case of *Barber v. Pomeroy* into court; and the judgment appeared to be entered for the plaintiff; and he quoted the *Book of Pleas* (f), and the case of *Andrews v. Delabay* (g), which was debt for one hundred pounds on three several bonds; and it appeared on the declaration, that one of the bonds was not due; and a verdict was given for the plaintiff, and entire damages and costs assessed; and the Court held, that although he could not have judgment in form as it is found, yet that upon the releasing damages and costs, judgment was given for the two bonds that were due.

Post. 134.

* [89]

ON THE OTHER SIDE, a difference was taken between an entire demand and several demands joined in one; for in the latter, if the plaintiff fail in one of them, and is right in the other, he may have judgment for what is well, releasing what is ill (h). But where the demand is entire, and the plaintiff, in making it out, shews he has right but to part of it, there the judgment must be against him in the whole, because he is wrong in his demand (i). There are some Books which make a difference where an action is grounded upon a *wrong*, and where upon a *contract*; but the true reason of that difference, as was said, is, because contracts generally are entire; for let it be for wrong or on contract, it is the same upon the difference of the entire and divided demand; and for this the case of *Andrews v. Delabay* (k) was relied on, for they are * seve-

(a) Cro. Jac. 498.

(b) 1. Saund. 205.

(c) Hilary Term, 7. Will. 3. Roll 459. reported Comb. 365. S. C. 12. Mod. 93. S. C. 5. Mod. 212.

(d) Stiles, 175. S. C. 1. Roll. Abr. 785.

(e) It is entered as of Hilary Term,

24. Car. 1. Roll 951.

(f) Placita Latina Rediviva, page 412.

(g) Hob. 178. S. C. 1. Brownl. 68.

(h) 11. Mod. 156.

(i) Cro. Jac. 538.

(k) Hob. 178.

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ral causes put in one action. If an action be brought upon a single bill, payable at several days, and one of the days is not yet come, the plaintiff shall not have judgment for that part that is due; but according to the notion on the other side he should; and the reason why it cannot be done is, because it is an entire demand; and it was said, that the difference taken in *Godfrey's Case* (a) would not affect this case; that is, a man brings an action for two things, and of his own shewing it appears, that he cannot have an action for one of them, or a better writ, there the writ shall be well for that part for which it is good: and the case of *Pemberton v. Shelton* (b) is not like this, for there the defendant severed it by his plea; for the jury might apportion it, or the defendant could do it by his plea, but he himself cannot do it, by shewing he has no right to part of what he demands; and the judgment here will not be final; but he may have a new action for what is due. The reason of this will hold in a real action; for if an *assise* be brought of a manor, the defendant cannot abridge this by claiming less or shewing title to less than a manor; for he must recover the whole manor or nothing (c); but if it be for so many acres, there he may abridge and recover part, because then the demand is several of several acres; but where he demands an entire thing, he cannot abridge his demand; but if he join several causes of action in one, there, though he fail in making title to part, he shall recover the rest; and in the case of *Barber v. Pomeroy* (d), GERMIN, Justice, was strongly against ROLL, Chief Justice.

CRISP
against
INGLEDEW.

1. Roll. Rep. 77.
Hob. 133. 164.
178.
5. Mod. 213.

HOLT, Chief Justice. This is no entire demand any more than every action of debt is, let it consist of ever so many differing particulars, as the case of the three bonds before put. Suppose each bond were for twenty pounds, the *præcipe* is of sixty pounds, and that is all one *præcipe*; and yet when he comes to declare, he declares upon three bonds, each of twenty pounds, that makes up the sum in the *præcipe*; notwithstanding, if it appear that one of the bonds is not yet due, then the Court, *ex officio*, shall abate the suit as to that bond, and give judgment for the rest; so in this action the demand is entire, but it is not so in the original foundation of it, for that is several; and this is the difference, if there be a certain stated sum specified in the deed itself, that shall not be abridged by any *remittitur* or release of the plaintiff, if he declare upon that deed; as if a man bring an action of debt upon a bond of thirty pounds, and declare upon a bond of twenty pounds, this will be bad, * because he has brought his action for more than is due; and this rests upon the deed only, and the sum in it does not amount to his demand; but if an action be brought upon a deed which refers to a matter of fact that makes the duty more or less, if the fact which is referred to will entitle him to a less sum only, and he demands more than the fact which the

* [90]

(a) 11. Co. 45.

(b) Cro. Jac. 498.

(c) 1. Viner Abr. 129.

(d) Stiles, 175. S.C. 1. Roll. Abr. 785.

deed

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Case
against
INGLEDEW.

2. Roll. Abr.
785.
Stiles, 175.

Comb. 365.

deed refers to upon computation will entitle him to, there let him remit so much of his demand as the fact does not make out, and it will be well, and he shall have judgment for the rest; for that fact which is not made out is not contradicted by the deed. And he said, that the case of *Barber v. Pomeroy* was an authority in point: It was debt for rent, and upon computation it appeared, that he demanded more than by the matter of fact out of the deed appeared to be due to him, and there he released what was demanded too much, and took judgment for the rest. And no diversity between a demurrer and a verdict, for that case was upon a verdict, and this upon demurrer. And he said, the case of *Tbwaite v. Ashfield* (a), before quoted, had been adjudged upon the authority of the case of *Barber v. Pomeroy*.

POWELL, *Justice, acc.* The plaintiff must make his demand entire, though he make his title of several particulars, as some by one bond, some another; yet being in the nature of several demands, and made up of several particulars, he may recover on the one and not on the other; and the case of *Barber v. Pomeroy* is exactly this case in its reason. He said, this was not a demand of one entire sum mentioned in the specialty, but of that which might be more or less by matter of fact out of it; as an indenture of lease refers to days of payment, and one demands more rent than there were days of payment past; so here he demanded more money than there were hundreds of stacks; and the one case being on verdict and the other upon demurrer makes no difference, *Godfrey's Case* (b) was upon demurrer, and the question there was, Whether the writ should abate for part and fail for part, or fail in all? And the same question is of the count here.

POWIS, *Justice*, was of the same opinion. And he quoted the case of *Howell v. Samback* (c); and as to the objection which was made, that thus the defendant might be ensnared into a demurrer, when he might have a good plea to bar the plaintiff, he said, that if he had such a plea he ought to plead it.

*[91]

* GOULD, *Justice*, conceived a difference between a demurrer and a verdict in this case; and said, that if an assise were for four pounds rent, one could not abridge that demand; and so he said it was in real and personal actions. If an action of debt be brought for rent, part seek and part charge, the writ abates in all (d).

HOLT, *Chief Justice*. As to the case of assise for four pounds, and shewing only disseisin of three pounds, that is quite another thing; for then he brings an assise of a rent, of which he was not at all disseised. And he said, this was a debt indeed arising by deed, but not a stated debt in the deed itself. And he said, the case was

(a) 5. Mod. 212.

(b) 11. Co. 45.

(c) Hob. 133.

(d) Year-Book 10. Hen. 6. pl. 5.
Dyer, 61. b. Yelv. 66.—But see now
4. Geo. 2. c. 28.

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no more than a man's avowing for a quarter's rent more than is due, and a demurrer thereupon. He should have a return irreplevisable for what is due. So of rent, and *nomine parcie*, and title only for rent.

GRIPS
against
INGLEDREW,

And by THREE JUDGES, judgment was given for the plaintiff, he releasing the overplus.

NOTE, Here it was agreed by the Court, that so much a hundred, and so much a hundred by retail, are the same thing, and that here either party may tell them out; and that if he that had told them had not told them right, then the other might shew that, and join issue upon it. And it was agreed here, that the property of every hundred that was cut at the time of the agreement did vest in the plaintiff; and so of the rest, as they were cut down. If the sale had been of five hundred stacks out of seven hundred, then the buyer might chuse; but if it were five hundred to be set out by seller, the setting-out would be a condition precedent.

Yoxon against Bennet.

Case 119.

ERROR OF A JUDGMENT affirmed in the court of Chester, upon a writ of error of a judgment given in the corporation-court of the city, in an action upon the case for a libel.

Judgment in an inferior court is good, although the summons was directed to the serjeant at mace, and the process to bring in the jury to the sheriff of the county. Ante, 23.

The declaration set forth, that the plaintiff was AN ALDERMAN of the city of Chester, a justice of peace, and a grocer by his trade; and that the defendant did maliciously, &c. publish a libel of him in these words, which he caused to be fixed up in several places of the town: "These are to advise all good persons to shew me where I may see Alderman Yoxon, to receive my money of him."

2. Salk. 417. 423.
6. Mod. 124.
2. Lev. 200.
1. Mod. 35.
3. Mod. 139.
8. Mod. 328.
Ld. Ray. 592.
777. 1182. 1369.
1. Bac. Abr. 236.
2. Bac. Abr. 117.
3. Term Rep. 183.

A demurrer to this declaration, and judgment for the plaintiff in the mayor's court, affirmed in the Chief Justice's court.

And here it was assigned for error, that upon the plaint levied below, the process to bring the defendant into court was directed to, and executed by, "THE SERJEANT AT MACE;" and after an interlocutory judgment in the demurrer, they directed a precept to "the sheriff of the county" to call a jury, and enquire of damages.

And IT WAS URGED, that they could not change that officer; but that the same officer who executed the *mesne process* should execute the *judicial* one; and they said, no prescription could be to justify these proceedings, because they had no sheriff until the time of Henry the Seventh; for until the twenty-first year of that king, the city was part of the county at large, and they had no sheriff but that of the county; and therefore this sheriff could not be an officer to the mayor's court, which is by prescription.

A SECOND

Yoxon
against
BENNET.

* A SECOND ERROR was, that upon an interlocutory judgment in an inferior court the way to enquire for damages is, for the SERJEANTS AT MACE to summons an inquest to appear in court, and to make enquiry in court; for it never was suffered in an inferior court, that the Judge of it should send his precept to another officer to enquire of damages; for that is the particular prerogative of the courts of WESTMINSTER-HALL to send to the sheriff to enquire of damages; and is more than even the courts of London have ever attempted to do.

A THIRD ERROR was, that the original was AN ATTACHMENT *per corpus*, which is only a process in trespass *vi et armis*, and not in case; for in trespass on the case, the original process is AN ATTACHMENT *per bona*, but not to arrest a man's body presently.

A FOURTH ERROR was, that the joinder in demurrer is *petit judicium pro damnis occasione transgressionis præd.* instead of *occasione transgr. super casum.*

CHESSHIRE *contra*. It is said before to be, *transgr. super casum*, and then *transgr. prædict.* must be *super casum*.

As to THE FIRST EXCEPTION he said, the city of Chester was an ancient county long before Henry the Seventh's time; and it had sheriffs time out of mind, and process directed to them, and abundance of such precedents; and the act of 11. Hen. 7. c. 15. was only a confirmation. And he said, all their precedents were thus, that THE SERJEANT AT MACE did execute the *mesne process*, and the sheriffs process after judgment; and that such a thing might be good by grant; and what may be by grant might have been by prescription; and he said, that, by law, the same person may be judge and minister (a). By the same reason, several may discharge the office of one (b). The course of a court is the law thereof, and need not be shewed specially in pleading; but the courts above are to be satisfied of it by precedents and certificates of the Judge of the court (c). And there is a difference in the manner of taking bail in this court and the common pleas; and so formerly of return of *scire facias*; this court did always require two *scire facias*, and returns to them both, but one sufficed in the court of common pleas.

Post. 95.

* HOLT, Chief Justice. Suppose the first process to THE SERJEANT AT MACE were wrong, yet appearance and pleading will cure it; for where a man has a day on THE ROLL, he may appear if he will at that day, though there be no return of the writ; and precedents are shewn as ancient as 5. Eliz. of this manner of proceeding.

POWELL, Justice, said, they could not take judicial knowledge whether the city of Chester had a sheriff only by act of parliament in

(a) 1. Cro. 138. Jones, 193. Year-Book 12. Hen. 7. pl. 3.

(b) Mod. 598. Noy, 64.
(c) Wincot's Case, 2. Co.

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time of *Henry the Seventh*; for that statute only says, then it was made a county; and the statute of 43. *Eliz.* c. 15. ordains, that the officer of an inferior court shall not swear a jury to enquire of damages before him; but the method is for them to summon a jury to enquire of damages, and to swear them in court before the steward or Judge of the court: and precedents were shewn here of writs anciently directed to the sheriff of *Chester*, and that there is a court by prescription holden there, called *the sheriff's court*.

Yotes
against
BENNET.

And by **POWELL, Justice**, An officer called "*sheriff*" might have been without a county, and so known time out of mind; and a subsequent act of parliament making it a county alters not the prescription: but he said, this could not be made good but by prescription; for the same officer that executes one process ought to execute all; and therefore if, upon exception to *the sheriff*, process be directed to *the coroner*, though the exception be afterwards removed, it shall never after go to the sheriff; and though there be no precedents of these proceedings but since the time of *Henry the Seventh*, yet if the current of precedents has been so ever since, we ought rather to run with the tide than to reverse all the judgments that have been given since; for in some cases, *Communis error facit jus*.

And, **PER TOTAM CURIAM**, judgment was affirmed, without regard to the inquests being taken before the sheriff.

Oades against Woodward.

Case 120.

UPON A REPORT by **MR. CLARKE, the Secondary**, the case was thus: One had given a warrant of attorney to enter judgment against him as of *Michaelmas Term*, or any other subsequent Term, and before judgment entered he died; and after the attorney entered up judgment as of a Term when the party was alive.

If either party die in Vacation, within a year after giving a warrant of attorney, judgment may be entered up of course at any time after in that Vacation.
S. C. ante, 2.

The debate was upon the * regularity of the entry, for that the attorney's warrant was determined by the party's death (a).

HOLT, Chief Justice, declared himself desirous to know how the late practice had gone, for he had known various reports of it formerly; at one time it had been reported, that if the plaintiff had entered judgment before the continuance-day after the defendant's death, it would hold good, but not after; at other times it had been reported, that he might enter it at any time before the effoin-day of the next Term as of the precedent Term when the party was alive; so, he said, it had gone both ways.

* [94]
S.C. 1. Salk. 87.
S.C. 3. Salk. 116.
S. C. Holt, 401.
S. C. 2. Ld. Ray.
766. 849.
Ante, 39.
Fitzg. 191.
Stra. 718. 88a.
1081. 1121.
Com. Rep. 117.
Tidd's Pract.
299. 694. 706.

THE ATTORNEY-GENERAL said, If the party do not enter his judgment within the year and day, he cannot do it afterwards

(a) See 2. Stra. 718. 1081. Barnes, 270. Viner's Abr. "Judgment" 107. without

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QADPS
against
WOODWARD.

without the leave of the Court (a), which cannot be had without an affidavit that the parties are living; and, Why is that required, if within the year it may be entered after death of the party?

HOLT, *Chief Justice*. The reason is, that if he enter it after the year, he must enter it as of that Term on which he has leave; but within the year he may enter of a precedent Term.

And *Shelley's Case* (b) was quoted at THE BAR, where judgment was given after the party was actually dead, because he was alive in the morning the first day of Term.

Ante, 39. 68.
Ld. Ray. 695.
766. 849.

HOLT, *Chief Justice*. If one die in the Vacation after *posse* settled, judgment is frequently entered afterwards; so if the rule be for entering of judgment in Term-time, and the defendant die before it is entered, it shall be entered after; so if the defendant die after verdict against him, after *day in bank*, judgment shall be entered against him.

Ante, 39.

* [95]

IT WAS OBJECTED to be a very inequitable thing; for by this means, one creditor would run away with all and leave the rest nothing; and this was said to be against both conscience and law, for it was a rule in law, whenever a thing is doubtful at law to go by equity; that this was a kind of a fraud; that a letter of attorney was in its own nature revocable; that death was an actual revocation; and therefore the attorney had no authority to confess the judgment; and that the statute of 29. Car. 2. c. 3. of Frauds and Perjuries, had made a difference in the case; for before that statute, a judgment referred to the first day of the Term of which it was entered, but since that statute, it refers only to the time of the actual signing of it, which time is to be marked on the side of THE ROLL: but that cannot be done in this case, * because the attorney has no authority at the time the judgment was actually entered, though he had one at the time it is said to be entered; and a warrant of attorney is revocable, though the party covenant not to revoke it.

Ante, 2.

ON THE OTHER SIDE, *Shelley's Case* (b), and *Sir George Reynel's Case* (c), in *Palmer*, were strongly insisted on.

Warrant of attorney revoked.
2. Mod. 77.

Ante, 92.

HOLT, *Chief Justice*. If this be fraud, it is a *pia fraus* to get a just debt by due course of law; and he agreed, that a warrant of attorney was revocable in its nature; but if there be a warrant of attorney to confess a judgment, and after the defendant come and revoke it before it is entered, yet the attorney shall enter it notwithstanding the revocation; and the course of the Court has been so time out of mind; and the course of a Court is the law of it. If judgment be entered in Vacation, and a writ taken out against the party's goods as of the Term before, yet the writ shall levy the money of his goods in the hands of his executors. If a fine be

(a) See 6. Mod. 212. 1. Will. 36.
and Tidd's Pract. 302.

(b) 2. Roll. Abr. 396. 1. Co. 93.
Moor, 136.

(c) Palm. 508.

acknowledged

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acknowledged before commissioners in the long Vacation, and no writ of covenant taken out, then the party dies immediately, they shall after enter the king's silver, and take out a writ of covenant as of the Term before, and nobody ever stopped upon it; nor was it ever moved in the common pleas, "Do not receive this fine, for the party died before the writ of covenant sued out." And the statute of Frauds and Perjuries does not extend to this case; for if judgment be given against him, and execution taken out in the testator's lifetime, it binds the goods in the hands of the executors (a); and the statute of Frauds and Perjuries is purely for the sake of purchasers, and in regard to lands, but makes no alteration as to goods, but binds them only from the delivery of a writ to the sheriff.

**Cases
against
WOODWARD.**

ANOTHER EXCEPTION was, that upon search it was found that no bail had been filed.

But HOLT, *Chief Justice*, inclined to compel the attorney to file bail now; for if it were an adversary action they would do so, and why not so here? And he said, he was very well satisfied as to the other point.

Bail filed after.
8. Mod. 31. 349.

But upon the last exception, it was suffered to go over till next Term (b).

(a) 2. Ld. Ray. 850. Tidd's Pract. 728.

(b) It is said S. C. 2. Ld. Ray. 850. that it appeared upon enquiry, that the roll, upon which the judgment was entered, was not brought into the office until after the effoin-day of the subsequent Term, and for that reason THE

Court refused to permit the roll to be filed, since purchasers or others might be prejudiced by it. But by S. C. 1. Salk. 87. it appears, that one of the reasons for refusing to permit the roll to be filed was, because the judgment was not docketed pursuant to the 29. Car. 2. c. 3. See also S. C. 3. Sa k. 116.

* [96]

* Anonymous.

Case 121.

HOLT, *Chief Justice*. There cannot be two *scire facias* taken out together, but the first must at least be seven or eight days out before the return of it, and then the second to be purchased (a).

Scire facias returned.
Ante, 40.
Post. 133.

Ld. Ray. 1177. 1467.

(a) Vide ante, page 5.

Nicholls against Tirrett.

Case 122.

WHEN one pleads the statute 8. & 9. Will. 3. c. 18. of Two-Thirds, if he would take advantage of the clause of being in custody, he must shew it to have been on the seventeenth of November; if of the clause of absconding, he must shew he absconded for debt at the time of the statute made.

Bankrupts.
Two-thirds statute private.

S. C. 2. Ld. Ray. 811.
Ante, 10. 16.

And HOLT, *Chief Justice*, said, he took the statute to be a private law; for though it concerned a great many, yet it concerned a particular sort of people.

And

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Microfilm
against
TIRRETT.

And here the plaintiff had judgment, because the defendant did not shew in his plea, that he had absconded at the time of the act made; but only said it was on the seventeenth of November.

Case 123.

Thomkins against Pracent.

Upon a lease for years from 24 June, rendering rent at Michaelmas, St. Thomas, Lady-day, and Midsummer, or within twenty days after; a demand of a year's rent as due on 25 December, is bad.

S. C. 1. Salk.

141.

S. C. 2. Ld. Ray.

319.

Ld. Ray. 152.

97-715-735-

DEBT FOR RENT. The plaintiff declared on a demise, bearing date the twenty-fifth day of August, in the eleventh year of William the Third, for seven years, from the twenty-fourth day of June before, paying quarterly at the most usual Feasts following the sum of three pounds and ten shillings, viz. Michaelmas, St. Thomas, Lady-Day, and St. John Baptist, the first payment to begin at the Feast of St. Michael, and so from thenceforth every year quarterly, at the most usual Feasts during the said Term, or within twenty days after the said Feasts.

IT WAS OBJECTED, that the rent is payable at Michaelmas, St. Thomas, Lady-Day, and St. John Baptist, and this action is brought "for fourteen pounds of the said rent for one whole year, ending on the twenty-fifth of December, and payable then within twenty days, viz. the tenth of January;" so that the twenty days were reckoned from the right day on which the rent was due, viz. the twenty-first day of December, St. Thomas's Day.

PER CURIAM. This exception, viz. that the rent was payable on the twenty-first of December, and then the year ended as to the rent; and then the rent had been payable and demandable if there had not been twenty days more; the declaration is bad, for it was for other rent than was * demandable and payable by the lease. And the case of *Parker v. Harris* was quoted (a): A rent was reserved half-yearly from Michaelmas; an action brought for half-a-year's rent ending the twenty-fifth day of March, which was not half-a-year from Michaelmas; and the rent being reserved half-yearly, without mentioning any day there, there must be a full half-year before it is due: but otherwise where it is made payable at such and such Feasts, quarterly or half-yearly; there, though the quarters or half-year in reality be not then expired, yet as to the reservation and payment it is.

And here THE COURT said, that in this case an action could not be brought for the rent until twenty days were passed; but it was due immediately after the Feast, and payable.

And here, forasmuch as the rent declared on, and the rent reserved by the deed, were quite different, THE COURT told the plaintiff that he could not *discontinue*, for this judgment could be no bar against the right rent (b).

(a) 4. Mod. 76. Salk. 262.

(b) And by HOLT, Chief Justice, POWELL and GOULD, Justices, against the opinion of POWYS, Justice, judgment was given for the defendant; for where there are special days of payment limited upon the *reddendum*, the rent ought to be computed ac-

cording to the *reddendum*, and not according to the *habendum*. But where the reservation is general, as half yearly or quarterly, and no special days are mentioned, there the half-year or quarter must be computed according to the *habendum*—S. C. 2. Ld. Ray. 319.

Anonymous.

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Anonymous.

Case 124.

OWEN AND OTHERS of the City of Coventry were bound by recognizance, and appeared for two Terms; and no prosecution being against them,

The Court, on default of prosecution, can only respite, and not discharge, a recognizance.

IT WAS MOVED to discharge their recognizance, or dispense with their appearance.

BUT THE COURT said, they could not do it; and all they could do was to respite their recognizance.

Ode against Norcliff.

Case 125.

Easter Term, 1. Anne, Roll 380.

IN AN ACTION on a bill of exchange it was pleaded in abatement, that the defendant was one of the clerks of the court of common pleas, and ought not to be sued out of that court without his consent. The plaintiff replied, that the defendant consented, but laid no venue where.

A replication that a clerk of C. B. consented to be sued in B. R. must lay a venue.

And PER CURIAM, It is therefore bad.

S. C. 3. Salk. 283. S. C. 2. Ld. Ray. 869. Post. 106. Stra. 837. 864. Ld. Ray. 135. 337. 702. 869. 1173. 1208. 1556.

S. C. 1. Salk. 4.

Anonymous.

Case 126.

A CERTIORARI issued to remove orders made concerning foreign salt, and the orders returned were concerning salt in general.

A certiorari to remove an order relating to foreign salt will not remove one relating to salt generally.

AND IT WAS HELD they were not well removed; for a special certiorari cannot remove general orders, though a general certiorari will remove special ones.

4. Hawk. P. C. 164.

Goodwin against Hilton.

Case 127.

PENDING A WRIT OF ERROR, the bail rendered their principal the twentieth of December before; and in the February following, the defendant meeting the plaintiff at large, told him, that he had rendered himself in discharge of his bail.

Bail render the principal. S. C. ante, 77.

* [98]

The plaintiff's attorney having no notice of the render, took out a capias against the principal, and a scire facias against the bail, who pleaded nul tiel person as the principal in rerum natura; and upon examination of the regularity of the render this matter appeared.

8. Mod. 129.
1. Peer Wms.
685.
Stra. 915. 641.
1217.

It was agreed by the Court,

FIRST, That bail might well render during a writ of error (a).

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(a) See Tidd's Pract. 144, 145.

H

SECONDLY,

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GOODWIN
against
HILTON.

SECONDLY, That by course of the Court, there ought to be an entry made by the defendant's attorney, with all convenient speed, in a book to be kept for that purpose in the office of the king's bench, to the intent the plaintiff may know how to proceed; that is, to charge the party in execution, or to take a *fieri facias* or other writ.

THIRDLY, That by the late rule of Court, besides this entry, there must be two days notice to the plaintiff's attorney before a *committitur* can be entered, or a discharge upon the bail-piece.

Reddidi se.
Ante, 85.77.51.
6. Mod. 309.
3. Salk. 57. 198.
2. Show. 398.
443.
Ld. Ray. 156.
342- 353.

FOURTHLY, It was also agreed, that the course of render is upon the *reddidi se*, signed by the Judge, to get a certificate from the clerk of the paper to the master of the office, which is his warrant to enter a discharge upon the bail-piece; but such certificate does not make the *reddidi se* better or worse.

And here was an entry made in the book kept in the office not only long before the second *scire facias* was returned, but likewise long after the *reddidi se*; and it would have been well as to that, but that it appeared the defendant had escaped long before.

Cafe 128.

Anonymous.

Costs.
Executor.
Post. 118.

PER CURIAM.—An executor shall pay costs for not going on to trial (a).

6. Mod. 91. Ld. Ray. 437. 865. 1413. 3. Mod. 103. Comy. 162. 1. Peer. Wms. 482. 593.
2. Peer. Wms. 285. 3. Peer. Wms. 347. Stra. 682. 871. 1106.

(a) By 14. Geo. 2. c. 17. "If a plaintiff, after issue joined, neglect to bring on the issue to be tried according to the course and practice of the Court, judgment may be given for the defendant as in cases of nonsuit, &c." But it is decided, that an executor and an administrator shall not pay costs on judgment as in case of a nonsuit under this statute. Howard v. Radburne, Barnes, 130. Bennet v. Cohen, 4. Burr. 1928. If, however, an executor or administrator do not proceed to trial pursuant to his notice, he shall pay costs, Elwis v. Mocatto, 2. Ld. Ray. 865. S. C. 1. Salk. 314. Rex v. Powell, 1. Stra. 33. for by the constant course of the Court a defendant is in-

titled to costs, if the plaintiff give notice of trial and neither go to trial nor countermand it in time, Rex v. Heyden, 3. Burr. 1305. So an executor or administrator is liable to costs upon a judgment of non prof. Hawes v. Sanders, 3. Burr. 1584. So also upon a discontinuance, where he has knowingly brought a wrong action, or otherwise been guilty of a default, Harris v. Jones, 3. Burr. 1451. But if the not going on to trial was not owing to the laches of the plaintiff, but proceeded from inevitable accident, an executor or administrator is not liable to costs, Barnes, 316. Hullock on Costs, 189.

Cafe 129.

The Queen against Sir John Bucknal, Knt.

If the lord of a manor hold by the service of re-

SIR JOHN BUCKNAL was lord of the manor of *Le More* in *Hertfordshire*, which manor was held by the service of repairing a bridge, all the alienees of the demesnes of the manor are separately liable to the whole charge of repairs.—S. C. ante, 54. S. C. 1. Salk. 358. S. G. Holt, 128. S. C. 6. Mod. 150. S. C. 2. Ld. Ray. 792. 804. 3. Salk. 77. 381.

ing

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ing a public bridge; and though all the demesnes of the manor, except the copyholds, were aliened;

THE QUEEN
against
SIR JOHN
BUCKNAL,
KNT.

Yet THE COURT held, that all the alienees were chargeable in proportion, yet the queen might charge any of them with the whole, and let him have contribution against the others: And though the lord * had nothing but the copyhold, yet forasmuch as the freehold thereof was in him, he was chargeable, and the Court would direct the information to be against all the parties liable; but let him that is charged have his remedy against the rest.

* [99]

Anonymous.

Case 130.

HOLT, Chief Justice, declared, that if complaint were made to him, that a justice of the peace had issued a warrant to take away goods out of a man's possession to which he pretended a right, he would send for the justice and bind him over; for people must take the legal remedy, that is, *detinue, trover, or replevin*.

A warrant must be grounded on a legal information.

Noy, 103.
1. Sid. 192.
Poph. 153.

Cro. Jac. 643. Stiles, 132. 1. Roll. Rep. 247. Ld. Ray. 556. 767. 858. 871. Stra. 8. 710. 1002.

Wortley Montague against Lord Sandwich.

Case 131.

UPON MOTION for a new trial, the case appeared to be thus:

What shall be evidence of conversion.

An executor several years before had left some household-stuff in the house by the consent of the heir, who used them afterwards; and within six years of the action brought, the executor demanded the goods, and the heir refused to let him have them; whereupon trover was brought, and the statute of Limitation pleaded.

Ante, 5. 12.
2. Salk. 422.
521.
Ld. Ray. 283.
838. 1099. 1101.
1. Vern. 456.
Fitzg. 170. 289.
1. Peer. Wms.
742.
Stra. 556. 736.
907.

And by THE COURT, The user before the demand was no conversion nor evidence of it; for it was with the consent of the executor till then. And the demand being within six years, the refusal which ensued it, and is the only evidence of a conversion in the case, was within the six years; and if a trover be before six years, and a conversion after, the statute cannot be pleaded.

The Queen against Sturney:

Case 132.

STURNEY was convicted in a summary manner on the statute of the 13. & 14. Car. 2. for, a fraud in a custom; and the conviction being removed here was quashed on motion.

If a statute create an offence, without saying how it shall be tried, it shall be tried by a jury.

For PER CURIAM, The statute directs no particular way of trial, but only that the offender shall be fined at the sessions; and

Comb. 8. 14. 3. Salk. 329. 331. Ld. Ray. 347. 712. 991. Stra. 820. 943. 952.

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THE QUEEN whenever an act of parliament makes an offence, and is silent on
against
STURNEY. the manner of trying it, it shall be intended to be a trial *per pais*
according to MAGNA CHARTA.

* [100]

Case 133.

* The Queen *against* Darby.

A person con-
victed of subor-
nation of per-
jury, may, after
judgment *quod*
capiatur pro fine,
move in arrest of
such judgment,
when brought
into court upon
the *capias*.

S. C. 1. Salk. 78.
2. Show. 1, 2.
1. Lev. 118.
6. Mod. 202.

DARBY being convicted of *subornation of perjury*, and a judgment, *quod capiatur pro fine*, and brought in upon the *capias*, offered to move in *arrest of judgment*.

THE COURT and **BAR** said, they never had known a motion in arrest of judgment, after a judgment *quod capiatur pro fine*.

IT WAS INSISTED ON *for the Queen*, that the judgment was complete : but the certainty of the fine could not be known until the party be brought into court, and that in the mean time there is a short entry made of the judgment, *quod capiatur* : But after the fine is set, then there is an entry made at large, and that is called the fine-roll ; and if judgment should be arrested now upon the motion, the entry must be *quod capiat inde fine die*, which would be contrary to the judgment before, upon which the *capias pro fine* issued ; and the judgment is as final as it can be, when it is *quod capiatur pro fine*, though **THE ROLL** be not made up until he be brought in upon the *capias*. And the first case in *Palmer* was quoted, where it was said, that a writ of error would lie of this judgment before the fine set.

BUT NOTE, There it was a judgment that he should be ousted of his franchise, and likewise taken *pro fine* ; and they said this was stronger than the case of ejectment ; for there judgment is not complete until damages be found, and yet a writ of error lies of the judgment before any damages found ; and the reason is, because by the judgment that is given, the possession is touched immediately ; and where a judgment is final for any part, writ of error will lie.

And here they would have the *capias pro fine* to be in nature of an execution.

Quod HOLT negavit, because it is not certain ; and he said, that upon an interlocutory judgment in case or trespass, a *capias pro fine* shall go, yet after they may move in arrest of judgment ; and these are likest of any to the case in question. And it is not like a judgment *quod computet* ; for after such judgment you cannot move in arrest of judgment ; for then there is no more to do, but to see what is behind.

And upon the doubt, time was given until the next day.

AND IT WAS AGREED, that if so be it could not be moved in arrest of judgment, it might very well be urged in mitigation of the fine ; and for that the exceptions were heard.

FIRST,

* FIRST, The information sets forth, that there was a cause in *chancery* between *A.* and *B.* and that a commission issued out of that court to examine witnesses in the cause, and that *J. S.* was sworn a witness before the said commissioners (without saying in that cause, or what he had sworn), that the defendant solicited him to forswear what he had sworn before; and it not appearing that the oath was in any cause pending, or that it was in any material point, were two exceptions; for that ought to be set forth, that the Court might judge whether it was a point material or not; for it could not be perjury if it were not, and then solicitation could not be a subornation.

In an indictment for subornation of perjury, it must appear that the party suborned committed the perjury.

Cro. Car. 337.

3. Mod. 122.

2. Hawk. P. C.

91.

4. Hawk. P. C.

85.

Str. 921. 1230.

SECONDLY, That *J. N.* was to have been a witness in the same cause, and that the defendant went and desired him to swear such a particular thing, without averring that it was false, or that he knew nothing of it.

These objections seemed of weight to THE COURT.

HOLT, *Chief Justice*. How shall we judge of the nature of his offence, and, by consequence, what fine to set, if we do not know it from the record of his conviction? If a man be indicted of perjury, and it do not appear what he swears, and that it was in a cause depending, and material to the point in issue, the indictment will be bad; and the Court is to judge what is material, and that they cannot do, if it be not set forth: and by the same reason, subornation must be of such a thing as would be perjury if sworn, and so must be shewn certainly.

2. Show. 12.

2. Salk. 514.

1. Salk. 374.

Comb. 460.

5. Mod. 343.

6. Mod. 167.

But as to the other point, it seemed to be a common-law offence (*a*), to offer money to swear to a particular thing whether true or false.

(*) 2. Burr. 1189.

The first of these is the fact that the
court is not bound by the decision of the
majority of the judges. It is only bound
by the decision of the majority of the
judges who are sitting on the bench.
The second is the fact that the court
is not bound by the decision of the
majority of the judges who are sitting
on the bench. It is only bound by the
decision of the majority of the judges
who are sitting on the bench.

The third is the fact that the court
is not bound by the decision of the
majority of the judges who are sitting
on the bench. It is only bound by the
decision of the majority of the judges
who are sitting on the bench. The
fourth is the fact that the court is
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majority of the judges who are sitting
on the bench. It is only bound by the
decision of the majority of the judges
who are sitting on the bench.

The fifth is the fact that the court
is not bound by the decision of the
majority of the judges who are sitting
on the bench. It is only bound by the
decision of the majority of the judges
who are sitting on the bench. The
sixth is the fact that the court is
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on the bench. It is only bound by the
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who are sitting on the bench.

The seventh is the fact that the court
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decision of the majority of the judges
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on the bench. It is only bound by the
decision of the majority of the judges
who are sitting on the bench. The
tenth is the fact that the court is
not bound by the decision of the
majority of the judges who are sitting
on the bench. It is only bound by the
decision of the majority of the judges
who are sitting on the bench.

MICHAELMAS TERM,

The First Year of Queen Anne,

A T

The Sittings

A T

Westminster,

BEFORE

Sir John Holt, *Knt. Chief Justice*

O F

The Court of Queen's Bench,

The Queen *against* Swanson, Baynton, Hartley, and Spurr, Case 134.

THE DEFENDANTS were all indicted upon the statute of 3. Hen. 7. c. 2. against stealing of women, &c.

The subsequent consent of a woman forcibly married will not extinguish the offence.

The indictment set forth the woman's age; that she was an heiress to J. S.; was worth in goods and chattels so much, and so much in land of inheritance; and that she was a virgin,

S. C. Holt, 319.
S. C. 5. St. Tr.

Upon evidence, the case appeared to be thus:

Baynton, personating a country lady, though in truth a woman of the town, took a lodging in the house where *Mrs. Plaisant Rawlins* * lodged (for that was her name), and after some time introduced the said *Swanson* into the house, as her brother, where he frequently had the conversation of the said *Rawlins*. In the mean time, *Mrs. Baynton* used to magnify her pretended brother's merit and goodness, insomuch that the said *Rawlins* had likewise declared her liking of him, and wished he would marry her. But to get her abroad without any of her friends, *Baynton* deluded her aunt and

453.
Post. 132.
Cro. Car. 493.
2. Vent. 243.
1. Hawk. P. C. 311.
Hale P. C. 119.
317.

* [102]

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THE QUEEN ^{against} her to go with her to church; and against the time, got bailiffs to take out a writ for *Rawlins* and her aunt, and so they way-layed and arrested them, and conveyed them from *Westminster*, where they lived first, to the *Garter Tavern* in *Drury-lane*, and there separated the aunt and her, and carried her to *Holborn* to the *Vine Tavern*, where *Swanston* came as her bail, and there married her, continuing under the arrest; *Baynton* telling her, that if she did not marry him she must go to *Newgate*.

Swanston and *Baynton* were found guilty:

For THE COURT delivered it to the jury for law, that though the said *Rawlins* had a fancy for the man, yet because she was not privy to the contrivance of coming out to him, and knew not before-hand, or consented so to come to him, and being married whilst she continued under that restraint and violence, though perhaps she consented to the marriage, yet the said fact was a crime within the statute; for here was a forcible taking away, and her subsequent consent, while under the restraint, could not be looked upon but an effect of the continuing force; and that though *Swanston* had known nothing of the first force, yet he knowing her to be under it, and marrying while he knew her to be under it, made him approve of the first force, and so partake of it, so as to be guilty.

NOTE, Upon this statute all aiders and assisters are principals,

AND NOTE, The man was hanged.

Hartly and *Spurr* the bailiffs were acquitted,

MICHAELMAS

MICHAELMAS TERM,

The First of Queen Anne,

I N

The Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

Sir John Powell, *Knt.*

} *Justices.*

Edward Northey, *Esq. Attorney General,*

Simon Harcourt, *Esq. Solicitor General,*

Le Noyer's Case.

Case 135.

IN AN INFERIOR COURT the record was made, in the part of issuing the process, "*præceptum fuit*," instead of "*præceptum est*."

The record of an inferior court cannot be amended by the draft of Counsel,

And because the draft of the Counsel given to the clerk, to enter up by, was right, it was moved now to amend the record by it,

Comb. 51. 126, 369.

Ld. Ray. 141.

But *PER CURIAM*, There never was any amendment by draft of Counsel; for it is a thing of no manner of authority, alterable at pleasure, and no offence to *change it; and the case put of a bond, is not like this, for a bond is an authentic thing; and an alteration in it is forgery, and if the party himself do it, besides the forgery, he avoids the whole bond. The statute is to amend where there is a letter too much or too little, through the fault of the clerk.

209. 310. 324. 565. 669. 679. 683. 1058. Stra. 846. 1197.

* [103]

HOLT, *Chief Justice*, said, he would gladly have an action brought against an attorney who makes such a fault in entry, contrary

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LE NOYER'S CASE. contrary to the advice of Counsel; for they sometimes do it out of malice, and sometimes out of presumption; besides no *diminution* lies of a record of an inferior court (a).

(a) But see Comb. 370. that no diminution lies to an inferior court.

Cafe 136.

Reignol against Taylor.

It need not be shewn, in setting forth the stile of an inferior court, that it was held within the jurisdiction. **ERROR OF A JUDGMENT IN TRESPASS at the Stannary Court.**

THE FIRST EXCEPTION was, that in the record sent up they do not, setting forth the stile of the court, say, that it was held within the jurisdiction of the court.

S. C. Holt, 185. **HOLT, Chief Justice, and THE COURT.** Where you declare in the inferior court, you ought to lay the fact, or cause of action, to have arisen within their jurisdiction; or if you declare, that at a court held, suppose at *Maidstone*, such a thing was done, there you must say, that the court was held within their jurisdiction of the court; but when you only set forth the stile of a court, you need not shew it (a).
 1. Co. 57. Co. Lit. 58. 1. Roll. Abr. 533. 434. 1. Lev. 50. 69. 96. 105. 137. 156. 208. 289. 2. Lev. 87. 230. 1. Mod. 32. 2. Mod. 141. 3. Salk. 216. 2. Show. 130. Ld. Ray. 211. 216. 230. 346. 796. 837. 1040. 1310. 1555. 3. Mod. 4. 77. 175. 374. 9. Mod. 95. 1. Peer Wms. 476. Stra. 256. 630. 786. 794. 827. 841.

A declaring in the *Stannary Court* must alledge the plaintiff to be a tinner. **ANOTHER ERROR** was, that it was not alledged that the plaintiff was a tinner; and by several acts of parliament concerning their jurisdiction, they ought to shew it.

And for this the judgment was reversed *nisi*.

4. Inst. 229. 2. Roll. Rep. 379. 1. Bac. Abr. 653.

(a, See Rowland v. Veale, Cowp. 18. Trevor v. Wall, 1. Term Rep. 151.

Cafe 137.

Cole against Henry.

The Courts will take notice on what day the king dies. **ERROR OF A JUDGMENT IN EJECTMENT in Ireland, in the court of queen's bench.**

THE FIRST ERROR assigned was, that no juror's name was entered on the record.

* [104] **HOLT, Chief Justice.** When there is a full jury, there * never is an entry of their names in a superior court.

THE SECOND ERROR assigned was, That the Judge who tried the cause, calls himself the Queen's Judge; and it nowhere appears that the king was then dead.

HOLT, Chief Justice. We are to take judicial knowledge who reigns over us, and whom we owe allegiance to; and though it be decent to take notice of the demise of the king, yet it is not of necessity.

And the judgment was affirmed.

Harwood

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Harwood *against* Parrot.

Case 138.

AN ACTION ON THE CASE was brought by husband and wife, for maliciously indicting the wife of a riot.

An action will not lie for maliciously indicting another for a trespass. Post. 105.

The declaration contained two counts: FIRST, shewing the plaintiff's wife was of good reputation, and that the defendant, to lessen it, indicted her of a riot, of which she was acquitted; the SECOND count was the same, and that the husband was put to great charge.

1. Salk. 114, 119.
2. Show. 255.
Comb. 311.
3. Salk. 63. 105.
Ld. Ray. 1031.
1208.

IT WAS HELD, as to the first count, to be no scandal to be guilty of *trespass*.

And THE COURT, as to the second count, inclined, that the husband alone ought to have brought the action, for he alone could be put to the charges.

But they delivered no positive opinion,

Wood *against* Branford.

Case 139.

ERROR OF A JUDGMENT IN DOWER in the court of common pleas, and in *nullo est erratum* pleaded.

On error in dower, a *certiorari* lies to inform the Court whether the infant defended by attorney or guardian.

It was assigned for error, that it was against *an infant*, who appeared by *attorney*, when he should have appeared by *guardian*.

S. C. post. 124.
6. Mod. 113.
1. Sid. 39.

PER CURIAM. Though it be after *in nullo est erratum* pleaded, yet we may grant a *certiorari ad informandas conscientias*, and a dowager is a kind of a purchaser.

206. 1. Lev. 99. 1. Jones, 199.

Shield *against* Cliff.

Case 140.

CLIFF being sued upon a bond, by the name of *Peter*, pleaded in *abatement*, that he was baptized by the name of *Paul*, and not by that of *Peter*; and concluded to *the country*.

Misnomer. Ante, 38.

And PER CURIAM, A *respondeas ouster* was awarded.

Comb. 40. 237.
1. Salk. 6.
6. Mod. 115.

3. Salk. 238. 2. Show. 504. Ld. Ray. 113. 509. 3. Mod. 113. 239. Comy. 41. 371. Stq. 356. 1218.

Haywood *against* Davis and Another.

Case 141.

MIDDLESEX, **B**E it remembered, that on *Friday* next after three weeks from the day of *St. Michael* in this same Term, before the lady the queen at *Westminster*, comes *Rebecca*

Pleadings in an action of trespass.

Haywood by *William Smyth* her attorney, and brings into the court of the said lady the queen, now here, her certain bill against *Margaret Davis*, otherwise *Davison*, and *Mary Bonner* in custody of the marshal, &c. of a plea of trespass, and there are pledges of prosecuting,

Salk. 4. S. C.

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HAYWOOD
against
DAVIS AND
ANOTHER.

Trespass for
breaking and
entering of the
plaintiff's close
and yard, and
disturbing the
possession.

prosecuting, namely *John Doe* and *Richard Roe*, which said bill followeth in these words, that is to say, *Middlesex*, to wit, *Rebecca Haywood* complains of *Margaret Davis*, otherwise *Davison*, and *Mary Bonner* in the custody of the marshal of the marshalsea of our lady the queen, before the queen herself being, for that they the same *Margaret* and *Mary*, on the first day of *October*, in the first year of the reign of our *Lady Anne*, now *Queen of England*, &c. with force and arms, &c. the close and court-yard of the said *Rebecca* in the parish of *Stebunheath*, otherwise *Stepney*, in the county of *Middlesex* aforesaid, broke and entered, and her the said *Rebecca* in the quiet use and occupation of the said close and court-yard did then and there disturb and hinder; and also for that they the same *Margaret* and *Mary* afterwards, to wit, the day and year aforesaid, with force and arms, &c. another close and court-yard of the same *Rebecca*, in the parish and county aforesaid, did break and enter, and five hundred pails of water and other water of the same *Rebecca*, to the value of twenty shillings, from and out of a certain fountain of her the same *Rebecca*, in the parish and county aforesaid being, without the licence of her the said *Rebecca* and against her will, from and out of the fountain aforesaid then and there did take and carry away; and also, for that they the same *Margaret* and *Mary* afterwards, to wit, the same day and year last aforesaid, with force and arms, a great quantity of dirt, soil, and water, in and upon the land and another court-yard of the same *Rebecca* in the parish and county aforesaid, did then and there put, place, pour out, and cast forth, and other enormities to the same *Rebecca* did then and there commit, against the peace of our said lady the queen that now is, and to the damage of her the said *Rebecca* thirty and nine shillings: And therefore she brings this suit, &c.

Plea of tenancy
in common in
abatement.

And the said *Margaret* and *Mary* in their proper persons come and defend the force and injury; &c. and pray judgment of the said bill of her the said *Rebecca*, and that the same bill may be quashed, because they say that the close and court-yard, and also the places in which the said trespasses are supposed to be done, are, and at the same time in which, &c. were one acre of land, and that the said *Rebecca* at the same time in which, &c. had nothing in the same acre of land, unless together and undividedly with the said *Mary Bonner*, who is in full life at the parish of *Stepney* in the county of *Middlesex*: And this they are ready to verify. Wherefore they pray judgment of the said bill, and that the same bill may be quashed, &c.

Replication.

And the said *Rebecca* saith, that the aforesaid bill of her the said *Rebecca* for the reason before alledged ought not to be quashed, because she saith that she, at the several times the several trespasses aforesaid are supposed to be committed, was sole seised of the said close and court-yard in the declaration of her the said *Rebecca* first mentioned, and also of the said close and court-yard in the declaration aforesaid of her the said *Rebecca* secondly mentioned, and

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of the aforefaid fountain in that declaration in-like manner mentioned, and alfo of the third court-yard in the faid declaration of the faid *Rebecca* thirdly mentioned, and that the aforefaid *Margaret* and *Mary* at the faid feveral times when, &c. did commit the feveral trefpaffes aforefaid, as the faid *Rebecca* by her faid declaration above complains againft them; without that, that the faid *Mary Bonner* at the refpective times aforefaid, or any of them, had any thing in the faid premifes, or any of them: And ſhe prayeth that this may be inquired by the country.

HAYWOOD
againſt
DAVIS AND
ANOTHER.

Traverse of the
tenancy in com-
mon.

And the faid *Margaret Davis*, otherwife *Daviſon*, and *Mary Bonner* ſay, that the plea aforefaid by her the faid *Rebecca Haywood* in manner and form above by their faid replication pleaded, and the matter in the fame contained, are not fufficient in law to compel them the faid *Margaret* and *Mary* to answer the bill of her the faid *Rebecca*, to which faid plea they the fame *Margaret* and *Mary* need not, neither by the law of the land are they bound in any manner to answer: and this they are ready to verify. Wherefore for want of a fufficient replication of the faid *Rebecca* in this behalf, they the faid *Margaret* and *Mary* as before pray judgment of the faid bill of her the faid *Rebecca*, and that the fame bill may be quaſhed. And for cauſes of demurrer in law in this behalf according to the form of the ſtatute in ſuch caſe lately made and provided, the faid *Margaret* and *Mary* here ſhew to the Court theſe cauſes following: For that the faid plea of her the faid *Rebecca* is double, uncertain, and wants form, and concludes to the country.

Demurrer.

And the faid *Rebecca Haywood* ſaith, that the plea aforefaid, by her the faid *Rebecca* in manner and form aforefaid in her replication above pleaded, and the matter in the fame contained, are good and fufficient in law to compel them the faid *Margaret Davis* and *Mary Bonner* to answer the bill aforefaid of her the faid *Rebecca*; which faid plea, and the matter in the fame contained, the fame *Rebecca* is prepared to verify and prove as the Court, &c. And becauſe the faid *Margaret* and *Mary* have not answered that plea, nor have hitherto in any wiſe contradicted it, the fame *Rebecca* prays judgment; and that the faid *Margaret* and *Mary* may further answer the faid bill of her the faid *Rebecca*, &c. But becauſe the Court of our ſaid lady the queen now here are not yet adviſed of giving their judgment of and concerning the premifes, a day therefore is given to the ſaid parties before our lady the queen at *Weſtmiſter*, until *Tueſday* next after eight days from the day of *St. Martin*, for hearing their judgment of and concerning the premifes, for that the Court of our ſaid lady the queen now here is not yet thereof, &c.

Joinder in de-
murrer.

Haywood againſt Davis and Another.

Caſe 142.

TRESPASS againſt two, for taking a pail of water out of the defendant's well.

In trefpaſs a-
gainſt two, one
defendant can-

not plead a tenancy in common between the plaintiff and other defendant; but if he do, a replication of ſole ſeiſin travelling the tenancy in common, may conclude to the country.—S. C. 1. Salk. 4.

The

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HAYWOOD
against
DAVIS AND
ANOTHER.

The defendant pleaded *in abatement*, that the other defendant and plaintiff were *tenants in common* of the well.

The plaintiff replied, that he was *sole seised*; *ABSQUE HOC*, that he was *tenant in common* with any, and concluded to *the country*.

* [105]

Ante, 53.
Comb. 86. 371.
Ld. Ray. 301.
337.

BRODERICK. * Where an *ABSQUE HOC* takes in the whole matter of the plea, there he who takes a traverse, may conclude to *the country*; but where an *ABSQUE HOC* is upon a particular fact, which does not comprehend the whole plea, there he shall not conclude to *the country*, but *aver*.

And IT WAS AGREED BY ALL, that in the case of *absque tali causa*, one may conclude to *the country*.

Ante, 39.
2. Lev. 261.
Ld. Ray. 312.
341. 737. 830.
871.

HOLT, Chief Justice. In trespass, it is no plea *in abatement* for a defendant to say, he was *tenant in common* with the plaintiff, because he may give it in evidence upon *not guilty*; but here the defendant who was a stranger pleads *tenancy in common* in the plaintiff with the other defendant, and that he may well do. And where one pleads *tenancy in common*, or *jointenancy* in abatement of the writ, and the plaintiff pleads in support of his writ, he shall conclude to *the country* generally; for it is there an *ABSQUE HOC* upon a special occasion to maintain his writ, and *ABSQUE HOC* there is merely put in for form; and is no more, than that the other who is seised jointly, or seised in common with him, has nothing there. Where you traverse a special point, you must conclude with an *averment*, and not to *the country*; but this is not a traverse of a special point.

And PER CURIAM, *Respons. ultra*.

Case 143.

Wittingham against Broderick.

Trespass for taking a wife's goods must be by the husband only.—Ante, 104. 2. Show. 255. Comb. 185. 8. Mod. 26. 200. 341. Ld. Ray. 224. 443. 2031. 1208. Stra. 229. 726. 977. 1094.

JUDGMENT in the court of common pleas, in an action of trespass by husband and wife, for taking away their goods, was REVERSED, because the wife ought not to join.

Case 144.

Crogate against Martin.

Mal conclusion cause of demurrer,

PER CURIAM. Not concluding to *the country* upon issue completely joined, is good cause of special demurrer.

* [106]

Case 145.

* Clifton against Swezeland.

The manner of pleading privileges by an attorney.—S. C. Holt, 589. 1. Ld. Ray. 336. 2. Salk. 545. 2. Ld. Ray. 1172. 1. Stra. 76. 534.

THE DEFENDANT pleaded privilege of the common pleas in abatement, without concluding to the record.

HOLT,

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HOLT, *Chief Justice*. He need not do it, but he may leave the plaintiff at liberty to reply; and deny his being a person privileged there, which the plaintiff cannot do if the defendant conclude to the record: And his not saying *prout patet* is no good cause of a general demurrer; and upon the *prout patet per recordum*, there shall go a *certiorari* to certify the record; and if they produce one and shew they have privilege, the plaintiff is estopped (a).

CLIFFTON
against
SWIZZLAND.

(a) See the case of *Phipps v. Jackson*, 6. Mod. 305. Tidd's Pract. 51.

Clerk against Yewdall.

Case 146.

QUANTUM MERUIT.—The plaintiff declared, that at the request of the defendant, he had done such and such services for him, and sets them forth; and that in consideration thereof the defendant promised to pay him *quantum mereretur*: There was a verdict for the plaintiff.

A declaration in *assumpsit* that the defendant would pay such sums as the plaintiff *rationaliter habere mereretur*, is good.

IT WAS MOVED in *arrest of judgment*, that the consideration being past, it should have been *quantum merebatur* or *meritus fuisset*. In *assumpsit* for mariners wages (a), where it was laid, that in consideration that B. *deserviret* instead of *deservivit*, the judgment was arrested upon that exception.

S. C. 2. Ld. Ray. 835.
S. C. 2. Salk. 649.
Post. 108.
Ld. Ray. 1155.
Stra. 306.
Cro. Eliz. 149.
Cro. Jac. 370.
Cro. Car. 77.
Ray. 9.
Salk. 557.
1 Com. Dig. "Assumpsit"
(H. 3.).

HOLT, *Chief Justice*. In all our judgments the entry is "*quod recuperet*," which is a subjunct; and yet it is a present act, and not a future one, for it would be ill to make it future; and it must be translated, "that he do recover," in the present-tense. So if present of potential or conjunctive be the same with present of indicative, why shall not preter-imperfect-tense of both moods be the same? And if this had been *merebatur*, you had allowed it good. And the merit is not past when the work is done, but continues until satisfaction.

And the plaintiff had judgment (b).

(a) Stiles, 444.

(b) See the case of *Meverley v. Lee*, 2. Ld. Ray. 1223. S. C. Salk. 538.

* [107]

Case 147.

* How against Prin.

IN AN ACTION ON THE CASE, the plaintiff declared, that he was a JUSTICE OF PEACE of the county of Gloucester; and also DEPUTY LIEUTENANT of the same county; and that he did intend to stand candidate for a KNIGHT OF THE SHIRE of that county, to serve in the parliament to be held at Westminster the thirteenth day of November the same year; that the defendant, knowing the premises, and intending to hinder him to be chosen

To say of a deputy lieutenant, justice of the peace, and intended candidate for a seat in parliament, "Do not vote for him, for he is" is actionable.—

"a Jacobite, who intends to bring in the Pretender and popery to destroy our nation," is actionable.—
S. C. 2. Lutw. 1293. S. C. N. Lutw. 410. S. C. 2. Salk. 694. S. C. Holt, 652. S. C. 2. Ld. Ray. 812. S. C. 1. Brown's Cases in Parl. 97. 1. Vin. Abr. 497. Ld. Ray. 236. 3. Mod. 270. 283. Comy. 439. Stra. 420. 617. 1157. 1168. 2. Show. 250. 3. Mod. 26. 2. Bl. Rep. 730.
knight

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Faint.

knight of the shire as aforesaid, and also to discredit him in the country amongst his neighbours, spoke these words: "Do not vote for *How*, for he is a *Jacobite*, and for bringing in THE PRINCE OF WALES," innuendo the pretended *Prince of Wales*, "and popery," innuendo the popish religion, "to destroy our nation," innuendo the nation of *England*.—And that at another time, viz. on such a day in *May* last, he, the plaintiff, being A JUSTICE OF PEACE AND DEPUTY LIEUTENANT of the said county, and also A PRIVY COUNSELLOR to her present majesty, the defendant did speak these words of him: "I," innuendo the defendant, "was arrested at the suit of the *Right Honourable J. How, Esq.*" innuendo the plaintiff, "and it has cost me," innuendo the defendant, "five pounds for my breakfast, and if you," innuendo the person to whom the words were spoke, whose name was set forth, "do not vote for him," innuendo the plaintiff, "he will serve you so too. I know why he did it: it is because I would not give my consent to bring in popery and the *Prince of Wales*, to destroy the nation."

Verdict, and four hundred pounds damages, for the plaintiff: and after many hearings in arrest of judgment,

HOLT, *Chief Justice*, delivered the opinion of THE COURT.—I and my brothers have considered of this declaration, and although we never spoke of it together until now, yet we all happen to be unanimously of opinion, that both these words are actionable. As to the first words, it may be fit to explain the meaning of them. We take it that the true sense of them, as they were spoken, was, That by them *Mr. How* was charged to be a *Jacobite*; and that he had a design, and a formed resolution, to bring in the pretended *Prince of Wales* and popery, to the destruction of this nation of *England*. * It is objected, that this is no direct charge; and that of bringing in popery is uncertain; for it is not said where it is to be brought in. But these words being spoke with respect to AN ENGLISHMAN, it must necessarily be understood, that he was for bringing of it into *England*, the words being spoke here by one *Englishman* of another. And it must be necessarily understood, that they are both *Englishmen*, for every man in *England*, *prima facie*, is to be understood to be of *English* birth, until the contrary appear. And for authorities here he quoted *Caudrey's Case* (a), upon the statute of 1. *Eliz.* c. 1. entitling her to issue commissions to her natural-born subjects to have ecclesiastical consueance; and the objection was there taken to the special verdict, that it was not found the commissioners were natural-born subjects; and the answer to that was, that every one in commission by THE QUEEN shall be intended to be a natural-born subject, until the contrary appears; and here it would be a very foreign intendment, to intend one that stands for parliament-man to be a foreigner, or a justice of peace to be so,

* [108]

Ante, 106.

till the contrary appear. Then if it be taken, that he was an *Englishman* here in *England*, of whom it is said by an *Englishman* here in *England*, that he is for bringing in popery, it must be necessarily intended, that it was here in *England*, especially when it is said in the words, to be "to the destruction of our nation:" so that the words meant, that *J. How* was for bringing in popery into *England*, to the destruction of *England*. Besides, if the words could have reference to the bringing in of popery into any other nation, it ought to be shewed on the defendant's side; and if that had been done, the verdict must have been for the defendant; for if the defendant had been a *Scotchman* or a *Dutchman*, and that had appeared upon the trial to the jury, in evidence, they must have given their verdict for the defendant; but, *prima facie* being spoken of and by an *Englishman*, it shall be intended into *England*. And this appears upon the consideration of *Cromwell's Case* (a). To say a man is a *murderer* abstractedly is actionable; but if the precedent discourse will alter the signification which the words *prima facie* bear, the defendant, upon action brought, must shew it; as in an action brought for saying the plaintiff * is "a murderer," the defendant pleads *not guilty*, and it is proved he said it, he may shew that the precedent discourse was about hunting, and that the plaintiff said to the defendant, he had killed so many hares, upon which the defendant said to the plaintiff, he was a *murderer*; that alters the signification of the words, and turns the verdict for the defendant. So here, if there were a communication concerning another country, with another man than an *Englishman*, that had altered the case, and the defendant must have been acquitted; but without such mitigation, it must necessarily be intended, that he meant the plaintiff to be a person for bringing popery into *England*. As to the *Prince of Wales*, who is meant by that? You object, we cannot take notice of a *Prince of Wales*; for there is no such person in *rerum natura*. We answer, at the time of speaking those words, the law of *England* takes notice of a pretended *Prince of Wales*; as appears by the statute of the eighth and ninth of *William the Third*. So that there was a person, of whom the law took notice, living, and pretended to be *Prince of Wales*; and why is he called "pretended *Prince of Wales*," but because he himself and others take notice of him as such, and pretend him to be so. And he compared it to the case of a *bastard*, supposed to be the son of such a father; in law he is not his son; but when he has the reputation and pretence of being his son, that pretence is enough to give the law such notice of him, as to enable him to purchase by that name. Therefore it is plain as can be, that *J. How* is by these words charged with a design to bring in the *Prince of Wales* and popery into *England*, to the destruction of it.

Then this being the natural sense of the words, the question is, Whether the words be actionable? I am not for declaring my

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against
PRIN.

See Peake v.
Oldham, Cowp.
276.

* [109]

How
against
PAIN.

* [110]

opinion what the law would be, in case the words had been spoken of a private man, because it is going further than we need, and to prejudge a point that is not now in question, but may come in question; and therefore for myself, I give this opinion only upon account of the person of whom they are spoke, as it appears on the declaration. * It appears in the first words, that he was A JUSTICE OF PEACE in the county; and likewise A DEPUTY LIEUTENANT: and an action lies against a person for words spoke of one in an office, upon two accounts: FIRST, To charge one in an office under the late king, or present queen, with such ill principles, that are of such a nature that they make him unfit to bear that office or employment, is actionable. For if he had such thoughts to bring in the pretended *Prince of Wales* or popery into this kingdom, it is fit he should be removed from that trust. Then he, as justice of peace, ought to punish popery, to proclaim those that will not come to church, to try and commit them. Surely then, one that is for introducing popery, ought not to be intrusted with an office, the duty whereof is to punish and suppress it. SECONDLY, He is *deputy lieutenant*, and as such he has power to defend the government of the county against all Pretenders; and his being of such principles as he is hereby charged with, makes him obnoxious to the established government; and not to be trusted by it in a post that is for defence of that government that he is said to be so averse to, when it may be for the advantage of the government to continue him in it, and a disreputation to him to be turned out of it upon suspicion. In the case of *Sir William Clarges* in the common pleas (a), he set forth, that he was a justice of peace, deputy lieutenant of such a county, and likewise at the time of speaking the words, that he intended to stand candidate for a borough, to be burgess in parliament, and that the defendant said of him that he was "a papist;" he is not charged with any act of popery, but only that he was a papist, and that only shews what his principle and affection is; yet being spoke of one in an office of trust, the whole Court of common pleas held that they were actionable, for the very being a papist is good cause to remove him out of his place; and that case did not rest singly upon that resolution, but a writ of error was brought of it into this court, and

* [111] here the judgment below was affirmed. * In the next place, if these words be well considered, they are still more scandalous, for they do not only charge him with having ill principles, but likewise with having formed a design to put those ill principles in execution, by bringing in popery and the *Prince of Wales*, even to the destruction of the nation. Then if he has such a formed design, that is a very great crime; and the case of *Sir William Clarges* (b) is a very strong case for me, and so is *Sir William Waldegrave's Case*, in *Coke* (c) and *Ervinz* (d); and both the said books agree in

(a) 3. Lev. 50.

(c) 3. Co. 391.

(b) Raym. 482. 3. Lev. 30. 3. Mod.

(d) 1. Lev. 255.

26. Skin. 68. 28. 1. Ffrem. 230.

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again
PRINCE

the report of that case : He declared that he was a justice of peace, deputy lieutenant of the county, and a captain of the queen's guards ; and that the defendant having discourse of him with such an one, his servant, said, "Thou servest no true subject," without accusing him with any particular act, but only generally, that he was not a true subject ; and it was adjudged, that being spoke of one in that high station, they were actionable ; and that case has not been yet questioned, but on the contrary, was quoted for good law in *Yelv.* 202. 104. where an action was brought by a private person for saying, "he was not a true subject," and held it would not lie for a private person. The defendant's malice in speaking these words, is pretty full upon this consideration. FIRST, They were spoke when the plaintiff had a design to stand for parliament-man, and that the defendant knew ; and the words were with design to hinder his election, "Don't vote for *How*, " &c." Why ? Because he is so and so principled, and so and so resolved to put those principles in execution ; they were spoken on purpose, and that is a great indication of malice ; and he designed credit should be given to his words. It may be objected, that he designed to bring in popery and the *Prince of Wales*, by act of parliament. But that is a very strange way of introducing it in a protestant country. But suppose we should intend it here, are these persons fit to be entrusted in a protestant government, or to be chosen members of their parliament, that would be for making a law to subvert the government and our religion, and to set up a Pretender to the prejudice of the title of the queen ? And is not that occasion to remove him ? And even in that sense, the words would be highly scandalous, and it would be time to *remove him out of an employment, which gives him such credit in the country. It is objected, that he is not charged with any act done ; but this objection is answered before, in the case of *Sir Walter Clarges* (a), and also that of *Sir William Waldegrave* ; and to make words scandalous, it is not necessary to charge one with an act ; but it is enough to charge him with having an ill design, and ill principle. In *Brownlow* (b), the defendant said of the plaintiff being an attorney, "He is a very good attorney, but he will plead "on both sides ;" he does not say that he ever has done it, only that "he will plead on both sides ;" and held they were actionable, because it shews he was of knavish and corrupt inclination. Also in the case of *Ellis v. Hunt* (c), where the plaintiff set forth that he was a journeyman shoemaker, and a cutter of leather, and that the defendant said of him to his master, "You keep such a one, who "will cut you out of doors ;" and the words "cutting out of "doors," were taken in the sense, that he would undo him ; and there the plaintiff is not charged with doing any act, but only that he would do it ; and yet the words were judged actionable, because of his ill intent. It is objected, that this office of justice of peace, or of deputy lieutenant, are not offices of any profit ;

* [112]

(a) 3. Mod. 26.

(b) 1. Brownl. 5.

(c) 1. Roll. Abr. 86. March, 1.

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therefore being turned out of such employment is no loss to him. And the case of *Major Bill* (a) was quoted, "You a justice of peace! You will make such another justice of the peace as *Major Bill*, who is a blockhead, an ass, a coxcomb, and a buffle-headed justice;" and it was adjudged that an action did not lie for these words, because he was not accused of any corruption in his employment, or any ill design or principle; for it was not his fault that he was a blockhead, &c. for he cannot be otherwise than his Maker has made him; but if he had been a wise man, and had wicked principles charged upon him, when he has not them, an action would have lain; for though a man cannot be wiser, yet he may be honest. If a man be in a place of profit, and he be accused of insufficiency, he shall have remedy by action; but if he be only in a place of honour, he shall not have action for words of insufficiency; but even there, if he be accused of ill principles, and ill-affected to the government, he shall have an action. * And the scandal in the present case goes farther; for it must be supposed, that the defendant designed to be believed, when he spoke these words, because he used this argument to hinder others from voting for the plaintiff; for he who hears him, must believe that he has detected this either from some speech or some act done by him the plaintiff; for no man is supposed to know the design or purpose of another but from his words or act; and therefore when one says positively that *A.* is for such a thing, he must take upon himself that he has detected some act or word of him, that gives him good reason to make this inference. And it is the most reasonable thing in the world, to adjudge such words to be actionable; for they that are in public employment would find it impossible to act with temper, if the law did not give them remedy; for if the defendant had not been brought to an account for those words, what would become of *Mr. How*? For it would be preached up in all the country, and there would be no way to hinder it; it would at last run to common fame, and that alone is good cause to hinder a man's being employed; for no man that is under an ill fame ought to be trusted with a place or employment of trust, and then no man could safely be in his place. The second words are actionable for the same reason before given; and though it be objected, that the second words, at least the latter part of them, are nonsense, "He arrested me for not consenting with him to bring in popery and the *Prince of Wales*;" for none can be arrested for not consenting to such a thing; the answer is, that the not doing of it cannot be the cause or foundation of the action, but it may be the motive why he was arrested.

By THE WHOLE COURT judgment was given for the plaintiff; and afterwards the judgment was affirmed in the HOUSE OF LORDS.

(a) 2. Salk. 659.

Harrow's Case.

Case 148.

LIBEL IN THE SPIRITUAL COURT for subfraction of tithes, A declaration in prohibition va-
for agistment of cattle. riant from the

They pleaded below that they were *inhabitants* of that parish, suggestion, is
and the other tithes were better for the agistment of cattle there; bad.
and this matter they also suggested for a prohibition; but in their Post. 137.
declaration upon a prohibition, they alledged they were *occupiers*. Ld. Ray. 130.

* **PER CURIAM.** The declaration ought not to vary from the 220. 587. 835.
suggestion, and if you do not declare pursuant to suggestion, a 991. 1172. 1211.
consultation ought to go; for if you discontinue your prohibition, a Gilb. Eq. Rep.
it shall go of course; and the reason why agisted cattle shall not 230.
pay tithes, is, because the other tithes of the same parish are the * [114]
better for the agistment there.

HOLT, Chief Justice. If you have a house in one parish and Cattle shall not
live there, you must not pay agistment for dry cattle there. But if pay tithes for
you be not a house-keeper there, you must pay tithes for agistment. agistment in the
And if there be cattle of the plow agisted in another parish, they parish where the
must pay tithes there where they agist, because they are not owner retides.
cattle of plow there. Cro. Eliz. 446.
Hard. 184.

THE COURT gave them leave to discontinue upon paying costs, Salk. 655.
and to pray another prohibition. 3. Com. Dig.
"Dimes"
(H. 5).

Anonymous.

Case 149.

PER CURIAM. If a pauper be nonsuit, there shall be costs A pauper non-
taxed, and he shall not afterwards go on without paying the suited shall pay
costs, or shewing, according to the statute 23. Hen. 8. c. 15. s. 2. costs.
that he was whipped (a). 1. Sid. 261.
2. Salk. 506.

Prec. Chan. 219. Fitzg. 161. 8. Mod. 344. 3. Peer. Wms. 258. Stra. 420. 578. 891. 1041.
1121. 1215. Hullock on Costs,

(a) But see *Sloman v. Aynel*, Fort. to 222, where all the cases on this sub-
ject are collected.
320.; *Blood v. Lee*, 3. Wilf. 24.
contra; and also *Hullock on Costs*, 210

Le Sage against 'Pere.

Case 150.

AFTER JUDGMENT in debt upon bond, THE COURT will Principal, inte-
not make a rule upon a plaintiff to take his principal, inte- rest, and costs.
rest, and costs. 6. Mod. 11. 60
153.

And **THEY HELD** in such case, the plaintiff ought to have his Stra. 787. 890
full costs out of the penalty (a). 618. 957.

(a) See 4. & 5. Ann. c. 16.

Cafe 151.

The Queen against Lee.

Quære, Whether a person in custody of the marshal of the king's bench, on *mesne process*, can be charged with a *capias* on a writ of *excommunicato capiend.*
Ante, 52.

Ld. Ray. 848.

1573.

Stra. 413. 873.

1245.

4. Com. Dig.
109.

* [115]

IT WAS MOVED, that *Lee* being in THE MARSHAL's custody might be charged with an *excommunicato capiend.* Here was an *excommunicato capiend* taken out of chancery, and a *non est inventus* returned.

IT WAS URGED, that it was to no purpose to take out another, when he is actually in custody of the officer of the court; and it was compared to the case of one in custody upon *mesne process* at the suit of *A* he shall be charged in execution at the suit of *B*.

BUT IT WAS ANSWERED on the other side, that there was a vast difference; for the *capias* upon a judgment is, *ita quod habeas corpus ejus* here at the return of the writ, and there in a manner the Court is possessed of him, because there the *process* is to bring him in hither; but upon an *excommunicato capiend* to the sheriff, the sheriff is not to bring him hither, but to keep him in gaol, and he is not to bring him hither but upon *habeas corpus*; and how can the Court lay hold on one that has no day in court, and is not before it?

THE COURT asked, if the statute of 5. *Eliz.* c. 23. had not been, what remedy they had?

And IT WAS AGREED there was none in that case; but the statute has made this difference, for it makes the *process* issuable in this court, and returnable here; but does not order the sheriff to bring the party in, but to take him and keep him.

HOLT, *Chief Justice*, agreed, if he were taken by *excommunicato capiend* first, and brought up here by *habeas corpus* to answer an action in this court, then he should be turned over to the marshal, charged with *excommunicato capiend*. But here there is a *process* out of this court, which gives him a day here, which the *excommunicato capiend* does not; and the reason of that is, because he cannot be in two several prisons at once.

But here they would not help, but consider until next Term.

Cafe 152.

Anonymous.

In what cases the presence of an attorney is necessary to render a warrant of attorney, given by a prisoner, valid.

Pott. 119.

5. Mod. 144.

1. Lilly, 44.

Ld. Ray. 357.

797. 850.

1. Pac. Abr. 188.

Cowp.

141. 231.

4. Term Rep. 433.

HOLT, *Chief Justice*. If a man be arrested at the suit of *A*, and while he is under confinement of the bailiff, he give a warrant of attorney to confess a judgment, if there be no attorney by, it is always taken to be *by duress*.

But when one is in gaol a good while, and then another that is his creditor, or supposed to be so, comes to him, and he voluntarily

without

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without any compulsion confesses a judgment to him, that judgment shall stand, though there be no attorney.

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against
LEE.

And if one be imprisoned in the *King's Bench*, and confess judgment or action to another, it shall be good; as if the declaration be delivered to one in custody of THE MARSHAL, and he confesses the action and gives judgment, though there be no attorney by, it shall stand.

Taylor *against* Griffith.

Case 153.

INDICTMENT of forcible entry and detainer concluded *contra pacem* of the late king and present queen; the entry being in King William's time, and detainer in the Queen Anne's time.

Forcible entry in the time of one king, and detainer in that of another, must not conclude *contra pacem* of both.

Per HOLT, Chief Justice. The conclusion is very improper, but there are too many that way to reverse them all.

But it was quashed upon the objection, that it did not appear what estate the party had, whether freehold, for years, or at will, and so the Court could not tell what execution to award; * but if the estate were set out, perhaps the possession should be restored to one, and the freehold to another: and here besides it was not said, that there was a disseisin of him that had the freehold.

* [116]
An indictment of forcible entry must shew the kind of estate of which the party was disseised.
Post. 123. 138.

And it was quashed.

Ld. Ray. 610. 1. Ventr. 306. 1. Sid. 102. 1. Mod. 73. Salk. 260. 2. Hawk. P. C. 41.

Thimblethorp *against* Hardesty.

Case 154.

HE brought an action as PRINCIPAL of *Furnival's Inn*, and declared upon an *insimul computasset* with him for several sums of money due to him and THE SENIORS of the society.

An action for money due to an Inn of Chancery will not lie in the name of the Principal only, but must be brought in the joint names of the Principal and the Ancients.

And after verdict IT WAS MOVED in arrest of judgment, that it cannot be his debt upon this promise; for by his declaration, the several sums are laid to have been due to him and the seniors of the society, and the promise, whether expressed or implied, yet still it must be a promise to them whose debt it was; therefore they all ought to join in the action.

Co. Lit. 164.
3. Lev. 362.
12. Mod. 413.
Ld. Ray. 79.
127. 596. 775.
952. 1134. 1535.
2. Peer. Wm.
511.
Stra. 1045.

Here IT WAS AGREED, that churchwardens might bring an action in their name for the debt of the parish, for they are A CORPORATION; but here the plaintiff is none: and the Principal and Ancients ought to join, not as Principal and Ancients, but as they are natural persons. If an accompt be made with the Dean of Westminster for money due to the Dean and Chapter of Westminster, this is an accompt with the Dean and Chapter, and the action must be brought in their names; that is, in their politic name. If plaintiff be trustee for the society of this house, he may sue in his own name,

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THORP
against
HARDESTY.

And PER CURIAM, A promise to one here is a promise to all, and all of them must join in an action brought upon that promise, even upon an actual promise. And the debt upon the account stated, arises to so many particular persons, and they all ought to join in the action; and though the defendant be one of them, yet the promise is to all the rest, excluding himself; and all the rest are joint-tenants against him; and a note made to one of the society by another of them, is a note to all except him that gives it. As if there be twenty partners, and one of them covenant with all the rest, he is in that respect several from them all, and they all joint against him.

And judgment arrested PER TOTAM CURIAM.

* [117]

Case 155.

* How against Granville.

After assign-
ment of bail-
bond, bail to the
sheriff cannot be
excepted to as
bail above.
Ante, 72.

PER CURIAM. After assignment of a bail bond, if the defendant put in the same bail that were put in to the sheriff, the plaintiff cannot except against them; but it is otherwise if he has not taken an assignment; and upon action brought against the bail, they are not held to bail.

2. Salk. 97. 6. Mod. 122. Tidd's Pract. 135.

Case 156.

Anonymous.

Ante, 53, 64.
1. Salk. 273.
2. Salk. 645.

A NEW TRIAL was denied after view, there being evidence of both sides.

653. 6. Mod. 22. 222. 242. Stra. 1105. 1142.

Case 157.

Dr. Watson's Case.

A writ of ex-
communicato ca-
fiends, reciting
that the party
was condemned
in costs in quodam
negotio officii sine
correctionis, is bad
for uncertainty.
S. C. ante, 56.

DR. WATSON was brought up, and prayed to be discharged for the fault in the writ.

S. C. 2. Ld. Ray.
217.
S. C. Carth. 484.
S. C. 2. Salk.
306. 294: 350.
Stra. 43. 76.
946. 1067.
4 Com. Dig.
"Excommunge-
ment" (B 4.).

HOLT, Chief Justice. The case of *The King v. Fowler* (a) was thoroughly considered, not only as to the process with penalty, but also, whether it was not necessary, since the Court is to award future process, to know the cause of excommunication in the writ? And we then thought that it was necessary, for this reason, because the chancery now have no power on the writ; but the power which they had, is by the statute of 5. Eliz. c. 23. given to this court; therefore, since this Court is to award process, they must know that it is matter of ecclesiastical consufance; and there is no other way for them to know that, but by its appearing on the writ; for chancery cannot relieve in the case, because the writ is in this court: If the cause of excommunication be not sufficient, the party has no remedy but in this court; therefore the

(*) 1. Salk. 253.

statute,

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statute, by necessary consequence of law, has made this Court judges of the writ of *significavit*. And so the very statute intimates when it says, that in case it be one of the nine causes, we shall award process with penalty; for how can we do that, if the cause do not appear upon the writ, and that from the grounds that we went upon in the judgment?

POWELL, *Justice*. The form of the writ was general before, but since the statute of 9. *Car.* the process is altered; and surely the Court must know whether you have jurisdiction below, as, before this statute, they must have satisfied the chancery; and after the writ is once here, the chancery has no more jurisdiction.

* [118]

EYRE said, the chancery took it they had jurisdiction still, for they had quashed an *excommunicato capiendo* there that very morning;

Which HOLT, *Chief Justice*, said, they could not do by law.

And Dr. Watson was discharged, and as many writs as were returned were quashed,

Anonymous,

Case 158.

MANDAMUS moved for to swear in a surgeon to an hospital.

Mandamus does not lie to an hospital to swear in a surgeon.

HOLT, *Chief Justice*, said, it could not be, for he was but a private servant; and it was agreed, that a *mandamus* had gone to swear a sexton (a).

Ante, 37. 83.
Post, 140. 243.
Ld. Ray. 989.
Stra. 536. 686.
881. 2192.

The rule was for them to shew cause.

(a) See 2. Roll. Abr. 234. March, 107.

Anonymous,

Case 159.

HABEAS CORPUS cannot be after judgment,

Habeas corpus,
1. Salk. 352.
Fitzg. 211. 266.

Anonymous.

Case 160.

IF ONE distrain again for the same rent, the remedy is *recaption*; and if the sheriff refuse a *replevin*, an action lies against him, *Replevin* is the remedy for a second distress.

Stra. 717. 851. 1040. 1272.

Anonymous.

Case 161.

UPON MOTION of Trigg against the sheriff of Kent, HOLT, *Chief Justice*, said, that if a sheriff return goods levied to such a value, he must answer for goods to that value, and plaintiff may be compelled by *distingas* to sell them,—1. Salk. 318. Ld. Ray. 252. 346. 482. 674. 718. 725. 990. 1073. 1075. 2. Vern. 239.

may

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ANONYMOUS. may have a *venditioni exponas*; and if he will not sell them, then the way is to have a *disfringas* to the coroner; and that is the right method to lay him by the heels until he has sold; and surely debt will lie against him after such a return, and a *venditioni exponas* (a).

(a) See the case of Clerk v. Withers, 6. Mod. 290. 11. Mod. 34. 3. Ld. Ray. 1072. 2. Tidd's Pract. 747.

Case 162.

Anonymous.

Notice of trial.
Ejectment.
Fett. 150.

IN EJECTMENT, if the defendant has not regular notice of trial, the way is not to confess lease, entry, and ouster, but to oppose judgment against the casual ejector.

Case 163.

Anonymous.

Administrator.
Costs.
Ante, 98.
Comy. 162.

AN ADMINISTRATOR shall pay costs for not going on to trial (a).

(a) See ante, 98. Salk. 314. 3. Salk. Barnes, 133. Bennet v. Coker, 4. Burr. 105. 2. Ld. Ray. 866. 1. Stra. 33. 1927. Nunez v. Modigliani, 1. H. B. 3. Burr. 1305. 1585. Ogle v. Moffat, Rep. 217.

Case 164.

Anonymous.

Certiorari.

1. Salk. 144.
30. Mod. 278. 4. Hawk. P. C. 144.

IT is unusual to send a *certiorari* without a special cause.

MICHAELMAS TERM,

The First of Queen Anne,

AT

The Sittings in Middlesex,

BEFORE

Sir John Holt, *Knt. Chief Justice*

OF

The Queen's Bench.

Edward Northey, *Esq. Attorney General.*

Simon Harcourt, *Esq. Solicitor General.*

The Queen against Sewel, alias Beaus.

Case 165.

THE DEFENDANT was indicted for usury, in taking nine pounds for the use of forty-five pounds for a year, *contra formam statuti.*

Evidence.
Usury.

1. Saund. 294.
1. Mod. 69.
2. Mod. 307.
3. Mod. 35.
- Comb. ga. 125.
- 133.
2. Salk. 680.

The case was, The defendant lent the prosecutor forty-five pounds upon a pledge of jewels, and it was agreed to pay the said interest. Afterwards, the prosecutor gave his bond for the same * money, and the bond not being discharged, the prosecutor was produced as an evidence ;

And he was sworn by HOLT, *Chief Justice, de bene esse*, as he said : and he said, it was a question, Whether the new bond were void or not ? And he put this case : A man makes a usurious contract, and gives him unlawful interest, and agrees to give him a bond for the principal ; and after, by a subsequent agreement, gives a bond for the sum lent to J. S. to whom the lender owes so much, in satisfaction of his debt ; this bond is not voidable by the statute.

* [119]

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THE QUEEN
against
SEWEL,
alias BEAUS.

1. Saund. 394.
2. Mod. 307.
3. Mod. 35.
2. Salk. 680.
Comb. 92. 125.
333.
3. Show. 8.
2. Show. 389.
3. Lev. 54.
2. Lee, 7.
Ld. Ray. 85.
91. 396. 730.
744. 752. 871.
3007. 1166.
3353. 1412.
3. Mod. 60.
Stra. 723. 595.
633. 1043. 1229.

statute (a). If a man lend money for the legal interest, and afterwards, a subsequent agreement is made for more interest, which is usury, that will not avoid the first contract.

Here HOLT, *Chief Justice*, declared for law, that where a man is interested in the consequence of that which he swears for, if it be that the doing of the act which he is now evidence to invalidate or set aside was a means to obtain his liberty from imprisonment, or an exemption from corporal punishment, he shall be a witness, as in the case of *duress*, though it be to set aside his own bond; yet it being given to obtain his liberty, he shall be a witness also, where the nature of the thing allows him no other evidence: As if a woman give a note or bond to a man, to procure her the love of J. S. by some spell or charm; in an indictment for the cheat, though it tend to avoid the note, yet she shall be a witness (b).

NOTE, Here it could not be given in evidence, that the defendant was a *common usurer*, because he could not be ready to give an answer to that matter.

(a) 12. Ann. c. 16. See also Pollard v. Scholey, Cro. Eliz. 20. and 2. Hawk. P.C. 7th edit. 8vo. ch. 82. f. 15, &c. where all the cases on this subject are collected.

(b) But see *Abrahams qui tam Bunn*,

4. Burr. 2251. Wallen v. Shelley, 1. Term Rep. 296. Masters v. Drayton, 2. Term Rep. 496. and 4. Hawk. P.C. 7th edit. 8vo. ch. 46. f. 132 to 147.

HILARY TERM,

The First of Queen Anne,

IN

The Queen's Bench,

1702.

Sir John Holt, *Knt. Chief Justice.*

Sir John Powell, *Knt.*

Sir Lyttleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Edward Northey, *Esq. Attorney General.*

Simon Harcourt, *Esq. Solicitor General.*

• [120]

* Anonymous.

Case 166.

JUDGMENT IN DEBT UPON A BOND in the common pleas, If judgment in debt on bond be affirmed upon writ of error here, and a new writ of error affirmed on error, and another writ of error brought, it is no *superfedeas*, unless the plaintiff in error puts in bail.

BRODERICK moved for a *superfedeas* of the execution without putting in bail; for before the statute (a) in that behalf, the allowance of a writ of error was in itself a *superfedeas*. And this case he said was neither within the words or intent of the statute; for when the judgment of the common pleas is affirmed here, there is no new judgment given here for the debt, but only the former judgment affirmed; and if this judgment should be affirmed before

THE LORDS, they do not award execution there, but command this Court to do it, and then the plaintiff will have the same advantage as he would have had if the judgment had not been before THE LORDS.

Comb. 129. 199.
206. 211. 456.
1. Salk. 321.
3. Salk. 133.
6. Mod. 130.
Ld. Ray. 16.

47. 97. 405. 1295. 5. Burr. 2819.

(a) See 3. Jac. 1. c. 8. and the case of Hammond v. Webb, 10. Mod. 281.

HOLT,

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ANONYMOUS.

* [121]

Comb. 206. 229.
325. 456.

HOLT, *Chief Justice*, said, the recognizance entered into upon the allowance of the writ of error in the common pleas, goes only to that writ of error that is then brought; and it is true, if the judgment affirmed here be reversed by THE LORDS, it will discharge that recognizance; but in case it be affirmed, here is a delay of execution, and costs that the plaintiff is put to, and the recognizance of the common pleas does not reach them. If the Court should erroneously affirm the judgment in the common pleas, not only the judgment of affirmation given by this Court, but likewise the original judgment of the common pleas would be reversed by THE LORDS. And this being within the words of the statute to entitle the plaintiff below to bail upon its removal up hither, when it is affirmed here, and a writ of error is brought before THE LORDS, that writ of error is not only of the judgment of affirmation given here, but likewise of the judgment given below; and the security given is that which makes the *superfedeas* of the writ of error; for that statute takes off the *superfedeas*, if security be not put in; and there is no more reason to give security upon the first judgment than on the second; and how can we take notice that there is a recognizance entered into in the common pleas, upon the first writ of error brought? For suppose it be not so, how shall we discover it? And we are not to presume it; for it is not the duty of the Court to compel a security, but what they are to do, is to award execution if it be not done; but the not putting in bail does not hinder the progress of the writ of error, but it was only to hinder delay of execution; and if there be no precedents in this point, the reason is, because of the rarity of the case.

And THE WHOLE COURT inclined, that it was not a *superfedeas* without bail:

But upon the importunity of BRODERICK, gave leave to speak to it again (a).

(a) See *Lane v. Bachus*, that the Court will not set aside an execution sued out before, but executed after the allowance of a writ of error, served on the sheriff and the party, if the plaintiff in error has not regularly put in bail,

2. Term Rep. 44. See also 2. Term Rep. 183. 4. Term Rep. 436. that a writ of error is not a *superfedeas*, where it is brought against good faith, or for the mere purpose of delay.—See also *Smith v. Shepherd*, 5. Term Rep. 9.

Case 167.

Gravenor against Fenwick.

An affidavit to put off a trial for absence of witness, must shew due diligence has been used.

S. C. ante, 70.

S. C. post. 156.

2. Peer. Wms. 117.

AFFIDAVITS were made to put off a trial at bar, set down for the first Tuesday in Term, upon account of the witnesses being not likely to be there.

DENIED, for that it was not sworn that endeavours had been used in such convenient time to have them, that without an unforeseen accident they would be at the trial at the set time.

S. C. Holt, 265. S. C. 1. Salk. 257. S. C. 2. Salk. 650. S. Mod. 288.

Anonymous.

Anonymous.

Case 168.

PAGE came to the bar, to shew cause against a prohibition to a suit in the ecclesiastical court of *Ely*, for a church-rate, for repairing of the church and church-ornaments.

In a libel for a rate to repair a church and ornaments, if it is not said how much is demanded for each, a prohibition shall go for the whole. Ante, 69.

The * suit set forth, the church was out of repair, &c. and that at a meeting of the parishioners, a rate was made by a majority of them; that the plaintiff for the prohibition was an inhabitant, and rated so much. The suggestion was, that *J. S.* is seised in fee of the manor of *Dale*, within the parish; that he, and all those whose estate he has in it, time out of mind used to repair an aisle in the parish-church, and in consideration thereof, were discharged of all rates for repairing the whole church, and that the defendant is tenant of part of the manor.

2. Lev. 102.
163. 186. 241.
1. Jones, 89.
1. Mod. 236.
2. Mod. 222.
1. Salk. 164.
Comb. 132.
278. 344.
Ld. Ray. 59.

FIRST EXCEPTION, That the libel is for repair of church and church-ornaments, and the prescription goes only to the repair of the church.

HOLT, *Chief Justice*. If you have not distinguished how much is demanded for ornament, you have not libelled right; and the prohibition, if it goes at all, must go for all.

SECOND EXCEPTION, The tendering of such a plea below, and refusal of it, is no cause of prohibition, but rather of appeal. Vide 1. *Bulst.* 16.

THIRD EXCEPTION, The prescription is, that all the tenants of the manor were discharged, and he makes himself tenant of part. Tenants of a manor exempted from repairing church.

HOLT, *Chief Justice*. If the tenant of the whole manor has such an exemption, a tenant in part shall have it in proportion.

HOLT, *Chief Justice*. Though a man time out of mind repair a chapel; yet if it be not a predial chapel, having chapel-wardens belonging to it, yet it is not a reason to exempt it from a church-rate to repair (a); and here if he repair less than his proportion amounts to, it may be a question, if it ought to discharge him? But if he repair more, or as much, it will be good: But this is not matter to be determined upon motion. Ante, 69.

And the rule was made absolute.

HOLT, *Chief Justice*. Declare forthwith; for in prohibition, we may order the declaration to be delivered as we please in point of time.

(a) See 2. Inst. 489. 2. Lev. 186. 289. pl. 50. 3. Mod. 264. 3. Burr. 1. Salk. 164. Hob. 66. a. Roll. Abr. 1689.

Case 169.

* The Queen against Taylor.

An indictment of forcible entry on the statute 8. Hen. 6. c. 9. must alledge a *seisin* in the person who is disseised.
Ante, 115.
Post, 138.

1. Vent. 306.
1. Sid. 102.
1. Mod. 73.
Salk. 260.
2. Hawk. P. C. 41.

INDICTMENT OF FORCIBLE ENTRY upon the statute of 8. Hen. 6. c. 9. without saying the party had been seised and disseised by force.

And it was quashed *nisi* before; and it was urged for cause, that that need not be expressly laid. *Vide Pop.* 205.

HOLT, Chief Justice. The case in *Popham* was upon the statute of 21. Jac. c. 15. upon which it suffices to say, that that entry was made upon a copyholder or lessee for years, and that he was expelled; but the present case is upon the statute of *Henry the Sixth*, upon which you must always alledge a freehold and seisin in somebody; and if it be an entry upon a lessee for years, you must say, the entry was made into the freehold of *A.* in the possession of *B.* and that so he disseised *A.*; and of necessity there must be a disseisin of the freehold laid; and upon restitution the possession is restored to the lessee, and the freehold to the other; and on this statute, *disseisin* is a term of art, not to be supplied by any other word.

The rule was made absolute by the whole Court.

Case 170.

Parker against Collins.

Amendment.

Comb. 86. 133.
299.
3. Salk. 30, 31.
5. Mod. 17.
1. Salk. 47. 88.
2. Salk. 520.

THE *placita* were "of Hilary Term in the thirteenth year of *William the Third*," and the declaration of *Easter Term* against the defendant *in custodia marischalli Marischalciæ domine reginæ.*

PER CURIAM. Let it be amended, for it is no part of the declaration, but only style of record.

There are four days to plead after demurrer.

AND THEY SAID, that after demurrer, the party has four days in Term to join or wave, and plead the general issue.

Comb. 19. Fitzg. 193. Ld. Ray. 68. 116. 8. Mod. 305. Tidd's Pract. 341.

Case 171.

Stracy against Saunders.

The payer of money shall elect on what account.

Comb. 377.
2. Vern. 105.

A MAN owes money by bond, and also by award, suppose twenty pounds by each, and he pays one twenty pounds, it shall be upon which of both he pleases; for he, and not the receivers, is the first agent. *Quære (a).*

8. Mod. 236. 242. 3. Peer. Wms. 365.

(a) Anonymous, Cro. Eliz. 68. *Perris v. Roberts*, 1. Vern. 34. *Goddard v. Cox*, 2. Stra. 1194. *Bret v. Marsh*, Heywood v. Lennox, 1. Vern. 24. 1. Vern. 648.

Pierce

* Pierce against Henriques.

Case 172.

Michaelmas Term, 1. Anne, Roll 46.

ASSUMPSIT.—The declaration contained two counts; and a “*non assumpsit*” was pleaded to one; and to the other, it being for one hundred pounds, was pleaded payment of ninety-nine pounds, which the plaintiff received; but nothing was pleaded to the rest. The plaintiff replied, denying the payment. And after demurrer,

What shall be said a discontinuance.

S. C. 2. Ld.

Ray. 841.

1. Salk. 94. 180.

1. Saund. 268.

327. 338.

2. Saund. 73.

1. Lev. 48. 127.

298.

2. Lev. 118.

PER CURIAM. The plea is well as to the ninety-nine pounds, for one may plead several pleas, as payment of part, and a release as to the rest, &c. And here it is a discontinuance (a); for he should have taken judgment by *nihil dicit* for so much as had not been pleaded to, and have pleaded as to the rest.

But IT WAS AGREED here, that the defendant could not plead “*non assumpsit*” in part, and a release or payment to the rest; for that would spoil the whole plea.

Being spoke to again, it was held to be a discontinuance *in toto*, **PER CURIAM.** And HOLT, Chief Justice, said, it might be doubted, whether it could be so pleaded in an *indebitatus assumpsit*.

(a) See 3. Lev. 39. 55. Comb. 306. 323. 1. Salk. 4. 94. 179. 186. Ld. Ray. 691. 841. Stra. 302. 947.

Wood against Brauford.

Case 173.

DOWER. It appeared on record certified up, this being a writ of error, that the defendant, being an *infant*, had appeared by *attorney*; and this was assigned for error.

The record in dower may be amended by the pleadings below. S. C. ante, 104.

And after “*in nullo est erratum*” pleaded, and demurrer thereupon, it was suggested, that there was an admittance of *guardian* below, and a warrant for the receiving of the guardian.

2. Salk. 270.

2. Saund. 212.

1. Mod. 47. 72.

296.

1. Lev. 131.

299.

2. Lev. 38.

Ld. Ray. 232.

PER CURIAM. If that be so, it is a good cause to amend the record; and as a precedent was quoted the case of *Waldegrave v. Lane*, in the fifth year of the late king and queen.

1005. 1284. Fitzg. 1. 8. Mod. 25. Stra. 784. 1076.

And **PER CURIAM**, After a good error in fact alledged, if the party will not join issue upon it, but pleads *in nullo est erratum*, he admits the fact to be true, and it is a good cause of demurrer.

“*In nullo est erratum*” admits an error in fact. Yelv. 57.

1. Lev. 311. 2. Lev. 38. Cro. Jac. 521.

Cafe 174.

* Chambers against Jennings.

A prohibition lies to the court of "the constable and marshal" on a libel sued there, for saying to a knight, "You are a scandal to the name of gentleman" and to the order of knight-hood."

S. C. 1. Salk.

553.

S. C. Holt, 597.

Dyer, 285.

1. Show. 353.

Lutw. 1053.

1. Lev. 230.

4. Mod. 128.

1. Sid. 353.

1. Keb. 310.

3. Hawk. P. C.

c. 4.

9. Bl. Com. 104.

DECLARATION on a prohibition to THE COURT OF THE EARL MARSHAL to stay a suit there against *Chambers*, setting forth, that *Jennings* is a gentleman born, and was dubbed a knight by *King Charles the Second*; that the plaintiff spoke these words to, and of him, "You a knight! You are a pitiful fellow, and an inconsiderable fellow, to the great scandal of gentlemen and of the order of knighthood;" and likewise to the great provocation of *Jennings* to duel and breach of the peace.

It appeared on pleading, that the questions were,

FIRST, Whether there is such a COURT OF HONOUR in *England*, as gives remedy for words not actionable at law, tending to the dishonour of *knighthood*, or of anybody bearing arms?

SECONDLY, If THE COURT OF HONOUR have such a jurisdiction, whether it ought not, in such case, to be held before THE CONSTABLE and THE MARSHAL, and not before THE MARSHAL alone? And the statute of *Richard the Second* (a) was likewise under consideration.

IT WAS URGED on the second point, that THE COURT OF HONOUR has been constantly held before THE EARL MARSHAL ever since the thirteenth year of *Henry the Eighth*, when the *Duke of Buckingham*, the then CONSTABLE, was attainted of high treason (b), except when a CONSTABLE was made *pro hac vice* (c). And it was said, that it did not follow from the authorities cited, that the court must be held before THE CONSTABLE and THE MARSHAL in all cases (d). The earl marshal is to see execution done, and yet he is one of the Judges of the court; and that is like most mayors courts, where the same person is both judicial and ministerial officer. The way to recover fees for making a knight, is in the marshal's court by 13. *Rich. 2. c. 2.* (e). The marshal has power where the common law gives no remedy, as in point of precedence (f). And he quoted a case in that court in the twelfth year of *James the First*, when there was no constable. As to the matter of arms, the court is held before the marshal only (g); so in matter of honour (h). In the case of *Ashton v. Jennings* (i) * it was held, that matter of precedence belongs to the court of honour; and though all the statutes that mention this court take notice of it, as held before THE CONSTABLE

(a) 13. *Rich. 2. c. 2.*

(b) 3. Hawk. P. C. 15.

(c) 4. *Inst. 124. 127.* Fortescue de Laud. 22. 32. 7. *Hen. 4. pl. 14.* Staund. P. C. 65. Co Lit. 74.

(d) Year Book 1. *Hen. 4. pl. 1.* Roll. Abr. "Paten" Camden's Britannia, 193. 151.

(e) 1. Roll. Rep. 89.—See Duppa v. Gertard, Stra. 78.

(f) 3. Bl. Com. 104.

(g) 1. Sid. 332. 1. Lev. 320.

(h) 2. Lev. 133.

(i) 2. Lev. 133.

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and THE MARSHAL, yet the reason of that is, that all the statutes taking notice of it were made when there was A CONSTABLE and A MARSHAL; and THE CONSTABLE being the principal Judge, when there is one, there is great reason to name him; and if the court had been suspended since the annexion of the office to the crown, there would be frequent application ever since for prohibitions, or complaints to parliament; for THE MARSHAL has exercised his jurisdiction ever since, and yet we find no such complaint: and the famous case of *Sir Francis Michell (a)*, deprived by authority of that court, was quoted, where some of the Judges of the common law had assisted. There is no remedy but here or by duel. If any assume to himself the arms of another, or arms to which he has no right, he is punishable for the same in that court; *à pari*, if one revile a person who has right to bear arms, there ought to be remedy against him there; and if people find no remedy at law for such words, they will have recourse to the law of nature, and do themselves right by the sword; to prevent which, actions for words at common law have of late had much greater encouragement than usual (b).

CHAMBERS
against
JENNINGS.

RAYMOND *contra*.

FIRST, This is one of the general courts of the kingdom, of Show. P. C. 58. whose jurisdiction and original this Court will take notice. The jurisdiction of it is, indeed, somewhat dark, there being only *obiter* sayings of it to be met with in the books; but the constant description being, that it is held before THE CONSTABLE and THE MARSHAL, is a great argument that it is not to be held before any other (c). An appeal of matters out of the realm, is to be held before THE CONSTABLE and THE MARSHAL (d). It is agreed, that, in matter of life or member, they had no jurisdiction without A CONSTABLE; and what is the difference or the reason of it (e)? The statute of 1. Hen. 4. c. 14. does not name them, as giving them a new jurisdiction. * The office of constable at first, was but a low one (f). In France, constables were the main leaders or generals of armies (g). The marshal was an officer under the constable, as the groom of the stables (h); and his business was to supervise the other officers of the army (i).

* [127]

(a) 3. Hawk. P. C. ch. 4. l. 9.

(b) 4. Co. 20. 3. Lev. 330. Rol. title "Prohibition." 15. Rich. 2. Mem. 23. In the time of King James the First, for calling a gentleman a villain, February 1617. Smith v. Gaddice, Rushworth's Collections, 1618. p. 2. f. 1055.

(c) The Year-Books 48. Edw. 3. pl. 3.; the Statutes 13. Rich. 2. c. 2.; the 1. Hen. 4. c. 14.; and Prynne on 4. Inf. 62.

(d) Year-Book 13. Hen. 4. pl. 4. and 5.; the 37. Hen. 6. pl. 3. Fortescue,

ch. 32. Spelman's Glossary, 146. Crompt. 92. Staunf. 71. Rushworth, 1640. 1066. Nalson, 778. Co. Lit. 74.

(e) Rushworth, 2. part, 107.; and the case of Lisle v. Ramsay, Hutt. 3.

(f) See Lambard's Saxon Laws, "Heretook;" and 3. Hawk. P. C. c. 4. l. 1.

(g) See Spelman's Glossary, "Mare-
"shall"

(i) 2. Rushworth's Coll. 1056.

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CHAMBERS
against
JENNINGS.

Post. 128.
1. Lev. 107.

SECONDLY, They have not consufance of words. A court of chivalry has no jurisdiction of words: besides, they pretend only to consufance of words not punishable at common law; and yet they say, the words in question are provoking to duel; and a person is indictable or may be bound to good behaviour for words provoking to duel (a).

HOLT, *Chief Justice*. It was made an argument some years ago, that a *prohibition* would not lie out of this court to the court of honour, because, as it was then said, none ever was seen to have gone before; and they relied on the statute of 13. *Rich. 2. c. 2.* which proves that if they should encroach upon things not within their jurisdiction, there should be a writ from THE PRIVY COUNCIL to restrain them. But notwithstanding this it was adjudged, that in case of encroachments, *prohibitions* would lie, and it was the proper remedy; for it is the duty and business of this Court to restrain all manner of inferior jurisdictions, and to keep them within their bounds; and the said statute was made to give a farther remedy by privy-seal from the council; and the reason of that additional remedy was, that THOMAS Earl of Gloucester, the then constable, was too great and powerful for the king's courts to deal with him; and besides there could not be application to this Court in Vacation, when they proceed below; and so it was held by all the Judges.—Now the first matter here is, concerning the constitution of the court; and no doubt, formerly it was held before THE CONSTABLE and THE MARSHAL, and so all along until the thirteenth year of Henry the Eighth, when the then constable was attainted of treason. How then came it to be held before THE MARSHAL alone, and have you any precedent before that time, that it was held before THE MARSHAL alone? To make it out by prescription, you cannot; for the first instance you give, is within time of memory, and no ancients than the court of THE COUNCIL OF YORK, which obtained by encroachment only, for first it was but a commission of *oyer and terminer*; yet it after drew in abundance of other matter, and all by the great * power of the president of the North. The court of request was only by encroachment, and they acted like masters in chancery, and held consufance of matters of law, without any prescription; and yet it fell at last of itself, without any act of parliament; their process was a *subpœna*. And he said, that he never knew what sort of jurisdiction A COURT OF HONOUR has, as to matters arising within England; for the statute of 13. *Rich. 2. c. 2.* gives them authority only of matters arising out of the realm, and feats of arms within the realm; by which they would have meant coats of arms and *escutcheons*. The ministers of that court understand this matter of arms well, and give coats of arms and keep pedigrees of families; and if they find people that assume arms, to whom arms do not belong, or at least that those they assume belong not to them, their way is to post them up, by what justice or law I cannot tell.

* [128]

(a) Hob. 62. 215. 252. Cro. Eliz. 58. 1. Lev. 55. Cro. Car. 498. Palm. 126.
2. Hawk. P. C. ch. 61. f. 3.

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In this case, what satisfaction can they make to the plaintiff? If they fine the defendant, shall they enforce the payment of it by imprisonment? We have a very known maxim, that no court shall imprison but a court of record; and THE COURT OF HONOUR is none. The high commission court had assumed a strange authority, more indeed than belonged to it, by the statute of *Henry the Eighth* or of *Queen Elizabeth*; and they carried their power so far, by authority of great men of the clergy that were in the commission, that it was hard dealing with them in WESTMINSTER-HALL; for that court assumed a power to imprison, though they could not justify it. And he said, it were to be wished the parliament would give them jurisdiction of words tending to disparage men of honour, and such as generally provoke gentlemen to fight.

CHAMBERS
against
JENNINGS.

1. Salk. 200.

POWELL, *Justice*. If they have jurisdiction of words concerning COATS OF ARMS, that is not this case: but here you say the words tend to breach of peace, and are provoking to fight a duel; and if so they are indictable (a).

Ante, 127.

And now this Term it coming on in THE PAPER, and none appearing for the defendant,

THE COURT said, that whatever colour there be to hold plea of some things before THE MARSHAL alone, there was no pretence to hold plea of words;

And ordered the rule for a *prohibition* to stand, and let them bring error in parliament if they will.

(a) See Burr. 316. 402.

* Gery against Hopkins.

* [129]
Case 175.

UPON A MOTION of MR. RAYMOND, it was ordered, that the book of transfer of stocks, and other books of THE EAST INDIA COMPANY, might be produced at a trial to be had the next day at *Guildhall*, or that the parties might have copies of what part of them they pleased to give in evidence; it being a cause between parties having stock there, concerning which the action was brought (a).

The East India Company is compellable to produce their transfer books in evidence.

S.C. 2. Ld. Ray. 851.

1. Salk. 281.

285.

2. Salk. 555.

1446. 9. Mod.

And PER CURIAM, There is great reason for it, for they are books of a public company, and kept for public transactions, in Yelv. 34. 3. Mod. 259. 5. Mod. 272. 2. Vern. 547. Ld. Ray. 253. 337. 927. 66. Stra. 93. 162. 481. 304.

(a) They are not obliged to produce their private books of letters, *Shelling v. Farmer*, 1. Stra. 645. nor the private books relating to the appointment of their servants, *Murray v. Thornhill*, 2. Stra. 717. Nor can any person who has not

an interest in them require them to be produced, *Crew v. Saunders*, 2. Stra. 1095. 1. Willf. 240. 1. Black. Rep. 40. See also *Mayor of Lynn v. Denton*, 1. Term Rep. 689.

Hilary Term, 1. Queen Anne, In B. R.

GERT
against
HOPKINS.

which the public are concerned; and the books are the title of the buyers of stocks, by act of parliament.

And it was granted.

Case 176.

Brown and his Wife against Gibbons.

In an action for words laid with a special damage, the plaintiff shall have full costs, though the words are not actionable, and the damages under forty shillings.

S. C. 1. Salk. 206.
S. C. 2. Ld. Ray. 831.
8. Mod. 26. 78.
372.
Stu. 936.
3. Burr. 1688.
2. Bl. Rep. 1062.
Tidd's Pract. 646.

AN ACTION ON THE CASE was brought for words spoken of the wife of the plaintiff, viz. "Mrs. Brown is a whore," whereby the husband lost his customers; and a verdict, and under forty shillings damages.

The question was, Whether there should be more costs than damages?

And it was said, that this was not damages for the words, but for the consequential damage; which, as was urged, was not within the statute 22. & 23. Car. 2. c. 9.; and it was said to have been adjudged, that in an action brought by a master, for a battery of his servant, he shall not be held lower in costs by reason of the lowness of damages (a); and so it was said to have been held in an action for slandering a man's title (b).

And THE COURT agreed to the diversity, between an action for words actionable in themselves (c), and an action for words actionable by reason of consequential damages (d).

And here judgment was entered with a blank for costs, which THE COURT were offended at, for it could not be filled after (e).

(a) Decided accordingly in Peak's Case, 3. Keb. 184.; for trespass for beating a servant *per quod servitium amisit* is not properly an action of assault and battery, but an action grounded on the special damage sustained by the loss of service; and therefore, not being within the statute 22. & 23. Car. 2. c. 9. s. 136. the plaintiff is entitled to full costs without a certificate. See also Anderson v. Buckton, 1. Stra. 192. Batchelor v. Bigg, 2. Bl. Rep. 854. S. C. 3. Will. 319.

(b) Law v. Harwood, Cro. Car. 141. Jones, 196. Palm. 529.

(c) Topfal v. Edwards, Cro. Car. 163. Philips v. Fish, 8. Mod. 371. Carter

v. Fish, 1. Stra. 645. 2. Ld. Ray. 1589.

(d) Bury v. Perry, 2. Ld. Ray. 1589. Surman v. Shellito, 3. Burr. 1688. Baker v. Hearne, B. R. H. Collier v. Galliard, 2. Black. Rep. 1062.

(e) The Court held, that this action is not an action for slanderous words within the meaning of the statute 21. Jac. 1. c. 16. s. 6. for the special damage is the gist of the action, and therefore the plaintiff had full costs, S. C. Ld. Ray. 831. See also Bais v. Hickford, Andr. 375. Mitchel v. Young-husband, 2. Barnes, 135.

Case 177.

The Queen against Whistler.

What shall be considered aiding and assisting to the commission of an offence.—S. C. 2. Salk. 542. S. C. 11. Mod. 25. S. C. Holt. 215. S. C. 2. Ld. Ray. 842. 1. Salk. 181. Ld. Ray. 584. 768. 791. 990. 1196. Stra. 44. 66. 1119. 4. Bl. Com. 34. Foster, 361, 362.

ROLFE AND OTHERS were convicted summarily, upon the late act of 3. & 4. Will. and Mary, c. 10. against deer-stealing.

The

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The question was, Whether the defendant was "unlawfully and unjustly aiding and assisting the said *Rolfe* in unlawfully and unjustly killing and hunting the said deer, viz. by persuading and meeting the said *Rolfe*, &c. to hunt and * kill the said deer; and lending them dogs to hunt and kill the said deer, and horses to carry them away, *contra formam statuti*;" and, Whether *Whistler*, as charged, be within the statute?

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* [130]

GOULD, *Justice*, made two questions of the case:

FIRST, Whether if the words "aiding and assisting" were totally left out of the statute, they would be guilty within the statute?

SECONDLY, Whether in case they were not, these words would bring them in?

The words of the statute are, "such as are aiding and assisting therein;" and he said the word "therein" was the same there, with "thereof" or "thereunto;" for he who lent his dogs to hunt, is aiding in the hunting. And this appears from the preamble, which shews the cause of making the statute; which is, "that notwithstanding the many laws made against unlawful coursing and killing of deer, that soasmuch as the penalties are not sufficient to deter divers sturdy and disorderly persons, who confederate together to commit these disorders; and if any of them be found guilty, which is rare, they contribute and make the penalty light upon him that is so convicted; therefore for the more effectual discovery of such persons;"—What persons? Such persons as do confederate,—"be it enacted, &c." And the word "such" couples the enacting part to the preamble (a). And here it would be very mischievous, that the world should know, that the statute does not extend to accessaries before the fact; for then the rich would incite poor and desperate fellows to hunt, and supply them with dogs, horses, &c. and they would not be punishable within the statute.—It is objected, that this is a penal law, and therefore to be construed strictly, and that "aiding and assisting therein," must be in the very act of hunting. But I answer, Quite otherwise; for aiding and assisting is properly before the act done (b). He who gives consent or aid to a trespass, is a principal trespasser, and as much punishable as he who actually commits it. So is consent to make clipt money high-treason, as much as the actual making (c). Under the word "aiding," come all those who counsel, abet, plot, consent, and encourage the fact, and are not present at the doing of it.

* SECONDLY, Suppose these words were not in the statute, yet the defendant would be within it, for it is a *trespass*; and I take it that there is no diversity between the case of *trespass* and *felony*,

* [131]

(a) Cro. Jac. 14. Co. Lit. 372. and Alexander Poulter's Case, 11. Co. 30, 31.

(b) 12. Co. 81.

(c) See Sir E. Coke's Commentary on the statute of Westminster the First, c. 14. 2. Inst. 183.

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Post 133.

as to the aiding and assisting, only that in the one they are principals, in the other accessaries only. And when an act of parliament makes a new law, and makes a crime *felony* that was not so before, though there be not a word of accessary, yet they shall be felons (a). The case in the Year-Book of *Henry the Seventh* (b), upon the statute *De Malefactoribus in Parcis* (c), he said, could not be distinguished from this case; that is a very penal law, for it inflicts three years imprisonment upon the party, and a fine to the king, and to find sureties never to offend more, and for default of sureties to abjure the kingdom, besides a large amendment to the party aggrieved; and yet he that did only command was adjudged to incur the penalty: which case he affirmed to run *quatuor pedibus* with that now in question.

Post. 132.
Cro. Car. 340.

Powys, *Justice*. The conviction is good by virtue of the words "aiding and assisting therein" in the statute. The statute *De Malefactoribus in Parcis* did not alter the offence, but left it a *trespass* as it was before; and that statute gave a complete remedy to the cases to which it extended; but, it only extending to misfeazance in ancient parks and parks of right, as appears by 2. *Inst.* 199, there still remained great defect of remedy, and no statute against deer-stealing mentions aiders and assisters, but that of *William & Mary*, which has the words now in question, without which, *per Lui*, the defendant could not be convicted; and for the signification of the words "aiding and assisting," he quoted *the Second Institute* (d). The case of *Evans and Finch* (e) is grounded upon a statute which has not the words "aiding and assisting" in it; and if they had, the person who stood upon the ladder would have been ousted of his clergy. And he would make a difference between cases of *felony* and *trespass*; for acts of parliament taking away the benefit of clergy in felony, do not extend to aiders and assisters before; but that, he said, was in favour of life; but there is no reason for a strict construction in trespass: and this statute, he said, was rather to be called a remedial than a penal law; and concluded that the conviction was good.

* [132]

* POWELL, *Justice*, accord. It is objected that this is a penal law, and not annexed to the offence, but to the person offending under such a description, and the aiders and assisters therein; and the distinction is taken between aiders and assisters therein, and aiders and assisters thereunto; He who only lends dogs, &c. to commit the fact, is not aiding in the fact, but to it; so such person does not come within the description of the statute. He agreed that a man may be aiding to a felony, and present at the doing of it, but he affirmed that such an aider would be a principal felon; but there may be likewise aiders that are absent, which, in case of felony, would only be accessary; and upon this the distinction is grounded, that one sort are aiders *therein*, and the other *thereunto*,

(a) Palm. 141.—See 4. Hawk. P. C. ch. 29. l. 13.

(b) 13. Hen. 7. pl. 12.

(c) 3. *Fedw.* 1. p. 20.

(d) 2. *Inst.* 182.

(e) Cro. Car. 473.

The second objection is, that this is a penal law, and for that reason not to be carried beyond the letter of it, by construction or equity; which he agreed. But he said, that such as lend dogs or horses to hunt, are aiders in the hunting, as much as aiders to it, and as much as if they were present at it, because the offence is trespass, and all aiders to or in a trespass are equally guilty of it, and all principals: So whoever persuades a man to do a thing which is a trespass, and that is proved in evidence, he shall be a principal trespasser; or if the thing to which he persuades be felony, he shall be accessory to it. And if a new felony be made by act of parliament, though there be not a word said of him who persuades to it, yet if he persuaded before the fact, he shall be an accessory; if at the time, he shall be principal felon; if comforting, receiving, &c. after, he shall be accessory after. And he said the distinction in the case of *Finch and Evans* was very nice; but however not like the present case, and he quoted the case of *W. a. c. 34*. "If a man ravish a married or any other woman, he shall have judgment of life and member," and what act can be more personal and penal than that? and yet aiders and assisters are ravishers within the statute; even a woman who cannot commit the fact herself, shall be so. By the statute of 3. Hen. 7. c. 4. for stealing of women, &c. all aiders and assisters are principals by the statute, yet there may be an accessory, as he who receives them (a), after knowing them to be guilty; and this by construction of law. The statute *De Malefactoribus in Parcis* is a penal statute, and it is not annexed to any fact committed, but to all misfeasors; *and yet aiders before the fact, are, by construction, brought under it. The first action that I find brought upon that statute, was in the twentieth year of *Edward the Third* (b): One broke into a park and rescued his cattle, which was a trespass, and by consequence within the words of the statute; and it was adjudged not within the meaning of it, and that the trespass meant by the statute was an unlawful hunting and killing of deer (c). In an action upon the same statute and not guilty pleaded, the jury find that the defendant did break the park in order to chase, but killed no deer, the declaration being that he broke his park and killed his deer, and there he was adjudged to be a misfeasor, and judgment was against him upon that penal statute. The next case that I find in the books upon this statute, is in the thirteenth year of *Henry the Seventh* (d), where it was adjudged that the defendant's inciting others to hunt, was a hunting in himself; and it is a very strong case upon so penal a law as the statute is. The statute 1. Hen. 7. c. 5. (e) enacted, "That if any person in day-time, with vizard upon his face, or paint or other disguise, wrongfully chase in the park of another, every such person shall be punished as a

Cro. Car. 34a.

* [133]

(a) That is, he that receives the offenders alone, for such as receive the offenders and the woman, are principals, by the very words of the statute.

—NOTE to former edition.

(b) See Year-Book 20. *Edw.* 3. pl. 11.

(c) Year-Book 50. *Hen.* 5. pl. 10.

(d) Year-Book 13. *Hen.* 7. 12. & 13.

(e) 4. Reeves Hist. Eng. Law, 144.

"felon;"

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"felon:" so that it is not bound up to the offence itself, and there is a proviso in that act to exempt, &c. And in case of felony, whether an offence be made felony, or the offender made a felon, they who persuade, incite, &c. would be accessary to a felony, and why shall it not be so in case of a misdemeanor too? And though the case of *Page and Harwood* (a) makes a distinction, where clergy is taken away from the offence, and where from the offender, under the circumstances described by the statute, as in the case of burglary, that where it is taken away from the offence, they that are aiding and assisting in the offence shall lose it, but where from the person offending so and so, he alone, and not the accessary, shall lose it, that diversity, he said, and also the case of *Evans and Finch* (b), were in favour of life. And in the case of *Evans and Finch*, if they both had got into the house, and one of them seeing the money had not touched it, but desired the other to fetch it, would not they both lose the clergy? The words of the statute are, "that he that enters and takes goods to the value of five shillings shall lose the benefit of his clergy;" and he said he could sooner be reconciled to the case of *Page v. Haywood*, than to that of *Evans and Finch*. For upon the union of the two nations, THE SCOTS brought in the fashion of daggers, and much mischief arose betwixt THE ENGLISH and them, to avoid which the statute of * Stabbing (c) was made. Suppose two men have a sudden falling-out, and a stander-by give his dagger to one of them, and desire him to stab him, which he does, and the man dies, I doubt whether they shall both lose the clergy: And he concluded the conviction is good.

* [134]

HOLT, *Chief Justice, contra*. I observe, that though my three brothers agree in one conclusion, they differ in the premises. GOULD says, that aiders and assisters would be within the statute, though there were no mention of them in it; POWYS says, it is merely because of the express words; and I differ from them both in the premises and in the conclusion. Everybody knows, that this being a penal law, ought by equity and reason to be construed according to the letter of it, and no farther, though the fact that you would bring under it be within the reason, and as heinous or more than that which is expressed in it. That this act is penal is most plain, for here is a penalty of thirty pounds. SECONDLY, which is highly penal, The defendant is put to a summary trial different from MAGNA CHARTA, for it is a fundamental privilege of ENGLISHMEN to be tried by jury, which privilege has been secured to us by our ancestors many hundred years ago. Then when there is a penalty inflicted, and a different manner of trial from MAGNA CHARTA instituted, and instead of being openly tried by his neighbours in a court of justice, he shall be convicted by a single justice of peace in a private chamber, upon the

(a) Allen, 43. Stiles, 86.

(b) Cro. Car. 340.

(c) 4. Bl. Com. 193.

testimony of one witness, I fain would know if upon the consideration of such a law, we ought not to adhere to the letter of the law, without carrying words farther than the natural sense of them? And let the preamble be what it will, and recite what it will, it is not enough to bring them under any penalty, if there be not words in the enacting part of the statute to do it. It is objected, that because "*confederacy*" is mentioned in the statute, it shall take in such as *persuade* and *incite*, &c. But I answer no; but by reason thereof the penalty shall be greater upon the actual offenders, and their trial more severe; and I never heard of such a rule, that because the preamble of a statute recites many particulars, and enacts a penalty only upon one of them, that the penalty shall be extended to all by construction. Then the words of the statute are "aiders" and "assistants therein," that is, aiding and assisting in the fact; and he who lends dogs and horses to hunt, aids a man to hunt and kill, but he is not thereby aiding in the hunting and killing. The law makes a great difference in framing an indictment in a case, where one is present, abetting and assisting, and where he is aiding and assisting, but absent at the time of the fact committed. If one be present, aiding and assisting in case of felony, he is a principal; as if two fight, and one stand by one of them with his sword drawn, he contributes to the actual killing; and that is what the law generally understands aiders and assistants to be. If an act take away the benefit of clergy from one who does such an act, and from aiders and assistants, yet it shall not take away clergy from the accessory: And for this he quoted the case in *Dyer*, 186. where the difference is taken, between the manner of an indictment of an accessory before, that is by aiding and assisting to the thing; and if it be after, that is for aiding and assisting and comforting after the fact; and if present, where they are said to be aiding and assisting in the thing. But it is also objected, that this is a *trespass*, and in trespass all are principals. To this objection I answer, It is very true, if the statute had inflicted this penalty under the name and denomination of a *trespasser*, there all that should be persuading, commanding, or anyway contributory before the fact, though absent, would be within it. So if it were after, because they are all by law trespassers, and the punishment is laid upon a *trespasser*, but not because he is under such and such particular circumstances; and so is the statute *Of Malefactors in Parks*, for it lays the penalty, not because they do mischief in a park in such a particular manner, but because they are trespassers there; and the words of the statute are not, that such and such as do so and so, shall incur a penalty, as the words are in our case. If the words of the statute *De Malefactoribus in Parcibus* had been, that such as did offend so and so, should incur such and such a penalty, none would incur the penalty but such as actually had chased: And our statute now lays the penalty on one particular person, under this particular circumstance, and not as he is a trespasser at large, but as he offends under such circumstances. The case of *Evans and Finch* (a) is very strong in the

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(a) Cro. Car. 474.

point;

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point: *Evans* went in at a window to a chamber in * THE INNER TEMPLE, and took forty pounds in money out of it, and all the while *Finch* was upon the ladder without-side, and in view of him who went in; and it was held, that he who stood upon the ladder should have the benefit of the clergy upon the statute of 39. *Eliz.* c. 15. There, no doubt, they both were principals in the fact; but because clergy is only taken away by the statute from such as enter and take away, and *Finch* did not enter, he had his clergy: Yet if clergy had been taken away from any that committed burglary or house-breaking, there he should not have it. For the statute did not take away clergy upon account of the felony, but upon account of felony under these circumstances of entering into the house and taking away: but in other cases, clergy is taken away from the offence of which he is found guilty: as in case of robbery on the highway; there all that are robbers shall lose their clergy; and one who goes to rob with another, though he stand at a distance from him and take nothing, yet he is a robber: But if clergy were taken away in this manner, that whoever shall meet a man on the highway, assault him so and so, and do rob him, shall lose his clergy, in that case an abettor would not lose his clergy, if he were not within such a particular circumstance, and strictly within the description. It is further objected, that in the case of a *rape*, whoever shall ravish a woman shall lose life and member, and that the benefit of clergy being taken away by the statute, the abettor shall also lose it, I answer, that the reason of it is plain, for there the act changing that which was *trespass* before into *felony*, the very species of the offence is altered thereby; the abettors of that crime must be felons, because they were guilty of that fact which is now felony; and the accessaries before and after shall be felons, because they were aiding, inciting, &c. to a fact which is felony. Every man who procures a felony to be done, is a felon: so of a crime of a higher nature; as if an act of parliament had made a felony treason, they that should be accessaries shall be now principals, because the species of the offence is altered. And there is a vast difference between both cases, for the one alters the nature of the offence, and the other only raises the penalty, when the offence is accompanied with such and such circumstances; and *per Lui* they who are procurers of a * fact, cannot be called aiders and assisters in it, but may be said to be aiding and assisting to it. My brothers have not quoted one case that warrants their conclusion. And he said, that he had known the case of *Evans* and *Finch* enquired into, and scanned since; and that he himself had ordered the record to be brought to him, and that judgment is as it is reported by *Croke*. It was an easy answer, he said, to a case, to say that it was a nice one, but he said the authority of it was never impeached, and if it had been in *trespass*, he who stood upon the ladder would have been a principal; but when the act took away clergy under such a particular description and circumstances, it was quite otherwise.

He

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He said, the case of *Page and Harwood* agreed in point with the reason of this; and if two quarrel, and a third person is the incendiary and put them on, and so in truth is the worst of the three, and one of the two stab the other, he who stabs shall lose his clergy, and he that set him on shall not; and the reason is, because one is within the description of the statute, and the other not; for clergy is not taken away from *the offence of manslaughter*, but from *the person committing manslaughter* so and so; yet in truth, he that encourages the other to stab, in consideration of law is as much guilty as the other of the manslaughter. The statute *Of Malefactors in Parks* describes the offence as a common trespass, and raises the penalty upon such common trespass done in a park; but here the statute raises the penalty upon a person who shall, in a park where deer are usually kept, &c.; and therefore this being not within the letter of the act, ought not to be brought within the equity of it. And he concluded that the conviction ought to be quashed.

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But THE COURT was against him (a).

(a) See the case of *Rex v. John Royce*, v. Sims, in the Appendix to the third edit. of *Foster's Crown Law*, 415.
4. Burr. 2073. and the case of *Midwinter*

Anonymous.

Case 178.

UPON A MOTION for a prohibition to a suit in spiritual court for tithe-wood:

Prohibition.
Tithes of wood.
Post. 148.

HOLT, *Chief Justice*. One may prescribe in a *non decimando* of wood; or it is a good plea that it is for boughs, lopping, germs, &c. of timber-trees of twenty years standing; and if that plea be denied below, it is good cause of prohibition; but if they receive and traverse it, they may try it here.

6. Mod. 252.
1. Show. 158.
172.
Ld. Ray. 137.
835. 991.

Anonymous.

Case 179.

HOLT, *Chief Justice*. You never are too late for a prohibition after sentence (a) in any case but one, and that is, where the suit is out of the diocese, upon the statute 23. Hen. 8. c. 9. because by pleading you own their jurisdiction (b).

A prohibition
may issue at any
time.

(a) See 2. Inst. 602. 619. 3. Mod. 286. Salk. 548. 2. Burr. 813. Dougl. 378. Cowp. 424. 1. Term Rep. 552. 2. Term Rep. 473.
(b) See Cro. Car. 27. 1. Vent. 61. 2. Show. 155. 6. Com. Dig. "Prohibition" (F. 9.).

Smith

Cafe 180.

* Smith against Cross.

Michaelmas Term, 12. Will. 3. Roll 191.

A *certiorari* to remove all pleas lately levied removes a plea levied between the *teste* and the return.

A *CERTIORARI* issued to the court of *Ely*, *tested* the twelfth day of *March*, in the eleventh year of the late king, returnable in *Easter Term*, to certify up all pleas *tunc nuper levat.*; and the plea was levied after the *teste* and before the return.

And *PER CURIAM*, It was well removed; for a *certiorari*, as well as a *recordare*, shall remove all plaints pending at the time of their return.

S. C. 1. Salk. 242.

S. C. 12. Mod. 643. S. C. 2. Ld. Ray. 836. 1. Vent. 68. 1. Roll. Abr. 395. Stra. 754. 1. Term Rep. 280.

Cafe 181.

Hardesty against Goodenough.

The Court may award restitution after *certiorari* in forcible entry is filed, unless the defendant plead three years quiet possession.

A *INQUISITION* of a forcible entry was removed hither by *certiorari*, at the suit of the defendant.

PAGE moved for a *procedendo*, before filing it, upon a suggestion, that the defendant had got possession of a house in which there were great store of perishable goods, and that now he would by this means keep it until the goods would be all spoiled.

PER CURIAM, We may award restitution immediately, though we file it, if the defendant do not plead three years quiet possession immediately before the force, and that his estate yet continues, according to the statute of 31. *Eliz.* c. 11.

Comb. 328.

1. Salk. 260.

3. Salk. 170.

Ld. Ray. 440.

483. 1011. Comy. 61. Stra. 474. 794.

Three years quiet possession a bar to forcible entry.

And *PER CURIAM*, The party ought to be ready with their plea in such a case as this; for one may justify a forcible entry, if he were three years in quiet possession immediately before, and his estate still continues.

Salk. 260. Carth. 496. 12. Mod. 268. 2. Hawk. P. C. 47.

Cafe 182.

Austin against Crisby.

Two *scire facias* of the same *teste*, but several returns.

Ante, 40. 96.

6. Mod. 86.

Comb. 452.

2. Salk. 599.

Comy. 53.

Ld. Ray. 1177.

1467.

EXECUTORS brought a *scire facias* *tested* the twenty-second day of *October*, returnable the fourteenth of *November*, and a second *scire facias* of the same *teste* returnable the twenty-third day of *November*; so by rule of court, the defendant had four days from the return of the second *scire facias* to plead, which indeed was all that remained of the Term. They did not plead; and the plaintiff took out a *scire facias*, returnable the same last day, to warrant a *testatum*.

And *PER CURIAM*, It was well; for though the defendant has four days after the return of the second *scire facias* to plead, yet that is a favour to him; when he does not plead, the judgment

is of the day of the return of the second *scire * facias*; and he may very well take out a *feri facias* after to warrant the *testatum*.

AUSTIN
against
CRISBY.

THE SECONDARY remembered a case where a *feri facias* was returnable before the judgment affirmed, and held good in favour of execution to warrant a *testatum*.

Gidden against Drury.

Case 183.

THE DEFENDANT being under arrest for a just debt, to get his liberty, consented to give a warrant of attorney to confess judgment to the plaintiff; and there being no attorney by, the plaintiff really discharged, as he pretended, the bailiffs, before the warrant executed.

A warrant of attorney is good, though no attorney was present, if the bailiffs were *being* *fact* discharged.

HOLT, *Chief Justice*, upon examination of the matter, declared, he would be very well satisfied by affidavits that the bailiffs were so discharged; so as if the defendant had refused to execute the warrant, they would not come again and seize on him, and that he would have reason so to believe before he would let the judgment stand; and though this were debt for money due upon a mortgage, yet he said there ought to be bail.

S. C. Holt, 401.
Ante, 2. 94. 115.
1. Salk. 400.
6. Mod. 85. 163.
Ld. Ray. 555.
797. 850. 896.
1142.
Stra. 530. 902.
1247.
1. Ter. Rep. 715.

Hopkins against Grey.

Case 184.

HOLT, *Chief Justice*, declared, that if a *banker* or *goldsmith* who has many people's money, refuse payment, yet keep his shop open, and as often as he is arrested give bail, he may by that means give preference of payment to his friends; and when he has done if he runs away, yet such payment shall stand against a commission of bankruptcy (a). And this was practised in the case of *Sheppard* the banker, who was almost arrested every hour in the day for several days before he went off (b), and yet gave bail as often, and paid his friends, and then went and rendered himself in discharge of his bail (c). And he put this case: If A. know B. a goldsmith, whose notes he has, to be in a declining condition, and C. to whom A. owes money, come to demand it of him, upon which A. asks him if he will take B.'s note in payment, and he is willing to take it, and A. gives it to him, he said, he doubted if this be not good payment, because here was not any artifice or surprize used. But if A. go to buy goods of another, and offers such a note in payment, and the party replies, "I will take it if he be a good man," and the other affirms him to be good, though he then knew him to be otherwise, that will not be good payment.

A banker's stopping payment is not an act of bankruptcy; and therefore, though hourly arrested, yet if he give bail he may, until some act of bankruptcy committed, prefer one creditor to others.

1. Salk. 110.
1. Lev. 13. 17.
2. Show. 253.
512.
Ld. Ray. 725.
Cases T. T. 185.
2. Peer. Wms.
427.
3. Peer. Wms.
298.
Stra. 744. 809.

(a) Bankers are declared liable to the bankrupt laws by 5. Geo. 2. c. 30.

(b) See 13. *Eliz.* c. 7. ; 1. *Yar.* 1. c. 15. ; 21. *Jac.* 1. c. 19. ; and Ex parte *Gulston*, 1. Atk. 193. *Malin v. Eyloe*,

2. Stra. 809. *Lindgood v. Eade*, 1. Atk. 196.

(c) See *Moseley*, 3. 7. *Viner Abr.* 61 pl. 12. in marg.

Anonymous.

Cafe 185.

* Anonymous.

A *mandamus* will not lie to grant administration to a particular person.
Ante, 37. 83.
118. Post. 143.

MULSO moved for a *mandamus* to commit administration to *J. S.*

CURIA. We cannot do that; but we may to grant administration to *J. S.* or *next-a-kin* according to the statute (a).

Ld. Raym. 262. Comy. 96.

(a) See *Steward v. Eddy*, post. 143. 21. 126. 138. 4. Burr. 1991. 1. Term 1. Stra. 530. 2. Stra. 992. 1. Will. Rep. 374.

Cafe 186.

The Case of Courtney, an Attorney.

"A writ of error pending" may be pleaded to an action of debt on the judgment.
Ante, 62. 121.

DEBT was brought upon a judgment in the common pleas pending a writ of error, and that matter pleaded in *abatement*.

5. Mod. 68.
1. Mod. 79.
4. Mod. 314.
Comb. 199. 206.

HOLT, Chief Justice. It is hard that a writ of error should supersede execution upon a judgment (a), and not supersede an action to be brought thereupon; for if there be a judgment against a testator who is also bound in a STATUTE, the executor may bring a writ of error and pay THE STATUTE, notwithstanding the judgment be afterwards affirmed (b).

229. 456.
Yelv. 157.
Hob. 72.
6. Mod. 130.
1. Salk. 321.
3. Salk. 133.
2. Mod. 28. 45.

POWELL, Justice. It has been held in THE EXCHEQUER-CHAMBER not to be a good plea, because it is upon another original, and a collateral matter; but that the Court would shew all manner of discountenance of it, and therefore would not hold the party to bail.

106. 112. 185.
8. Mod. 129.
1. Peer. Wms. 351.
Stra. 632. 367.
Ld. Ray. 47.
405. 1179. 1295.

HOLT, Chief Justice. Though it be a new original, yet it is no collateral matter, but the judgment on which the writ of error is brought is the *git* of the action. And as to the case in THE EXCHEQUER-CHAMBER, he said, that he had spoke to, TREBY, Chief Justice, about it, and that he had informed him it had gone off upon another matter, viz. that the conclusion of the plea was ill, for it was "*petit judicium si* the party *responderi debeat* till "judgment affirmed," and not *pet. jud. de billâ* or *brevi*. And the case of *King v. Tuke* (c) was remembered, where it had been held a good plea in abatement.

THE COURT gave no opinion (d).

(a) See *Jaques v. Nixon*, 1. Term Rep. 280. and *Doe v. Bracebridge*, 1. Term Rep. 2. *notis*.—See also 3. Term Rep. 643. 4. Burr. 2454.

(b) *Bearblock v. Read*, Cro. Eliz. 322. S. C. Yelv. 29. S. C. 2. Brownl. 39. S. C. Godolphin, 219. S. C. Co. Ent. 152.

(c) Ante, 12.

(d) See *Syms v. Tims*, 1. Show. 98. *Rottenhoffer v. Lenthall*, 1. Show. 146. *Deighton v. Glanvil*, 4. Mod. 248. that

"a writ of error pending" cannot be pleaded in *abatement* of an action of debt on a judgment: but the Court, under circumstances, stay the proceedings in the action until the writ of error is determined, *Taffwell v. Storey*, 4. Burr. 2454. *Grebbs v. Abbot*, Cowp. 72. *Entwistle v. Shepherd*, 2. Term Rep. 78. *Christie v. Richardson*, 3. Term Rep. 78. *Kempland v. Macaulay*, 4. Term Rep. 436.

Anonymous.

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Anonymotus.

Case 187.

PER CURIAM. Till bail put in, one is not in court to move to bring in principal, interest, and costs (a).

Principal, interest, and costs. *Ante*, 114.

(a) See 4. & 5. *Anne*, c. 16.

6. Mod. rr.

* [141]

* Anonymous.

Case 188.

HOLT, Chief Justice. I never knew money brought into court, and it struck out of the declaration in *debt*, though it has been done upon a bond with condition, in debt for rent, and in a *mutuatus est*; and he said, that he had known it done in *replevin*, the distress being for rent (a); and that the first motion ever made for bringing money into court upon a *mutuatus* had been done by *Levinz*, in *KEELING*'s time.

In debt upon articles, money cannot be brought into court.

8. Mod. 176.

236. 305.

Stra. 576. 638.

787. 822. 890.

1191. 1217.

NOTE, Here it was debt upon articles (b).

(a) See *Walpough v. Houghton*, 1. Barn. 229. *Fulwell v. Hall*, 2. Black. 337.

(b) But this is now provided for by the statute 4. & 5. *Anne*, c. 16.—See *Tidd's Practice*, 289. 410.

Blainfield against March.

Case 189.

A SEAMAN died in the voyage; and the captain, according to the usage among them upon such occasions, took all his goods and sold them at **THE MAST**, and made an inventory of them, and of the rates he sold them at, and delivered it to the administratrix at his return.

Quere, If the inventory and sale of a dead seaman's property at **THE MAST** is conclusive evidence of their value, or the practice of *mast-selling* legal.

The administratrix brought an action of trover for the things just as they were mentioned in the inventory, and recovered just the value for which they were sold in damages.

But **HOLT, Chief Justice**, held, at the trial of this cause at *Guildhall*, this usage of selling the goods of dead seamen at the mast to be void.

The plaintiff declared of a possession of the intestate, and of a loss by him in his life-time, and laid the conversion to be in his own time; and the defendant pleaded not guilty.

In trover by an administrator on the possession of the intestate, is cannot, on the general issue, be given in evidence, that the deceased made a will, and that the executor is living.

BRANTHWAITE for the defendant offered to give in evidence, that there was an executor alive, and so the property out of the plaintiff by the will.

S.C. 2. *Ld. Ray.*

HOLT, Chief Justice, held, that, this being trover upon the possession of the intestate, and not guilty pleaded, the defendant could not give in evidence a will made, and executors appointed, but that it ought to have been pleaded in *abatement*: but if trover

24. S. C. 1. *Salk.* 285. S. C. *Holt*, 44. 2. *Salk.* 654. *Ld. Ray.* 191. 991. 1219. 1529. 8. Mod. 200. *Stra.* 60. 128.

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had

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BLAINFIELD
against
MARCH.

had been on the possession of *the administrator*, there, upon *not* guilty, he might take advantage of that matter in evidence. And if an executor bring trover upon the possession of his testator, upon not guilty, he shall not be put to prove himself executor; but otherwise, if he had brought it upon his own possession.

Trover for
twelve *thebis de*
spirit, with a
dash, and fifty
gallons *aque*
callide, AN-
GLICE "hot
waters," is
good.

5. Mod. 181.
314.
1. Lev. 48.
1. Sid. 60. 98.
2. Lutw. 1439.
Comb. 306.
1. Ld. Ray. 20.

One *item* in the declaration was, that the intestate had been possessed of "*duodecim dimid. thebis de spiritis*," with a dash as here, ANGLICE "twelve half cases of spirits;" AND ALSO fifty gallons *aque callide*, ANGLICE "hot waters."

BRANTHWAITE in arrest of judgment moved,

FIRST, That it is uncertain what is meant by "*cases*."

SECONDLY, That the quantity ought to appear.

THIRDLY, That *spirits* is of an uncertain sense.

FOURTHLY, That it ought to have been put into *Latin*, since it has a *Latin* word, or with a framed word and AN ANGLICE (*a*); for if words be so uncertainly laid that it is not known what is meant by them, it is ill; but if they be insensible words, no damages

* [142] shall * be intended to be given for them.

And this was agreed to by THE COURT.

And THEY ALL HELD, that trover will lie for "*a case*" or "*a tub*," because it is an individual thing; but if one bring trover for "*a tub of water*" or "*a tub of beer*," without shewing how much it contains, they inclined that it was uncertain, though it shall be understood to be for the tub and the beer; but it was agreed, it would lie for "*a trunk of linen*," for "*a library of books*," &c.

MOUNTAGUE *contra*. In the case of *Herbert v. Lane* (*b*), an action of trover was brought by a carrier for "*a trunk of linen*" and other matters; and it was held good after verdict. An action for burning the defendant's barn, *per quod* he lost several goods, *et quedam ornamenta pro equis*, has been held good after verdict (*c*). In *Ventris* (*d*) there is the rule before put, that if words be insensible, damages are not given for them; and if they have any certain sense, then it will be well. He said, "*a case of brandy*" or "*a case of spirits*" was as well known among seamen as "*a hundred of fruit*" or "*a bottle of wine*" among others. Trover for "*goods to the value of three hundred pounds*" is good (*e*); for "*two plancis granarii*," ANGLICE "*planks of a granary*," has been held good, because confined to a certain use and place (*f*). So also for "*a library of books*," without saying how many or what books (*g*). It is good for "*a piece of brandy* (*h*);" for

(a) See 4. Geo. 2. c. 26. and 6. Geo. 2.
c. 14.
(b) Stiles, 370.
(c) 1. Keb. 825.
(d) 1. Vent. 17.

(e) 2. Roll. Rep. 154.
(f) 1. Sid. 98.
(g) Stiles, 338.
(h) 1. Lev. 303.

"*quidam*"

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“*quādam parcell. fili (a).*” So also for “*decem paribus tegulorum et velorum,*” ANGLICE “curtains and vallance (b).” So also “*de tribus struib. fæni,*” ANGLICE “three cocks of hay (c);” “*de duoden. fili,*” ANGLICE “a dozen of thread (d);” “*de uno messuagio,*” ANGLICE “the sign of the *Cross Keys* (e).” So also “*de uno plumbo, &c.*” and “for a sack of corn (f).”

BLAINFIELD
against
MARCH.

HOLT, *Chief Justice*. One may have trover for “a piece,” though some pieces be larger than others; and “a library of books” is easily ascertained by the place they are in; and asking what they are worth in the whole (g). And he put the case of trover of so many “*rails et palis,*” ANGLICE “rails and pales (b).”

1. Salk. 219.
2. Salk. 654.
Comb. 306.

And though here the word “gallon” was said to have a certain Latin name, that is “*congius,*” yet HOLT, *Chief Justice*, said, our gallon is not the same with that of THE ROMANS.

The case being moved at another day upon the word “spirits,” which was said was *English*; whereas by the statute of Henry the Sixth (i) all pleadings are to be in Latin; THE COURT held, that “a case of spirits” was certain enough, and that “spirits” with a dash might be well * taken for “*spiritibus*”; and there is the word *galo galonis*, or *galona galonæ*, to be met with in *Spelman* for an *English* measure, containing eight pints, called a gallon.

* [143]

And PER TOTAM CURIAM, the plaintiff had judgment.

- | | |
|--|------------------------------|
| (a) 2. Saund. 74. | (e) Stiles, 419. |
| (b) 1. Lev. 301. 1. Sid. 445. 2. Sid. 174. | (f) Wood v. Smith, Cro. Jac. |
| (c) 1. Keb. 237. | (g) Ld. Raym. 588. |
| (d) 1. Lev. 48. | (h) See 1. Com. Dig. 317. |
| | (i) See 3. Bl. Com. 322. |

Steward against Eddy.

Cafe 190.

MANDAMUS to grant administration to the wife of the intestate or next of kin.

MANDAMUS
for an admn-
istration.
Ante, 140.

And it was shewed, that there was a will pretended below, and adjudged no will; and an appeal of that sentence.

1. Lev. 18.
Ld. Ray. 862.
1. Pr. Wms. 47.
3. Pr. Wms. 337
Stra 392. 91.

And PER CURIAM, The appeal being a suspension thereof, the rule for the *mandamus* was discharged (a).

- (a) See Anonymous, ante, 140. Rex v. Dr. Hay, 1. Black. Rep. 640.
Ray. 235. 1. Sid. 281. 372. 1. Lev. Lovegrove v. Bethel, 1. Black. Rep.
187.—See also Anonymous, Stra. 552. 668.

Booth against Johnson.

Cafe 191.

ENGLAND, } THE lord William the Third, late King of Eng-
to wit. } land, &c. sent to his right trusty and well-be-
loved Thomas Trevor, Knt. his chief justice of the bench,
his writ close in these words (to wit), William the Third, by the
L 2 grace

Writ of error.

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against
Johns.

grace of God, of England, Scotland, France, and Ireland, king, defender of the faith, &c. to his right trusty and well-beloved Thomas Trevor, Knt. his Chief Justice of the Bench, greeting: Because in the record and process, and also in the giving of judgment of a plaint which was in our court before Edward Nevill, Knt. and his companions, then our Justices of the bench aforesaid, by our writ, between Thomas Johnson and Mary his wife, administratrix of the goods and chattels which were Sylvanus Rowley's, gentleman, who died intestate, as it is said; and Anne Booth, late of Westminster, in the county of Middlesex, widow, of a plea of trespass upon the case, as it is said, manifest error hath intervened, to the great damage of her the said Anne, as we have received from her complaint: We, willing that the error (if any there shall have been) to be corrected in due manner, and complete and speedy justice to be done to the parties aforesaid in this behalf, command you, that if judgment thereof be given, then that you send the record and process aforesaid, with all things touching the same, to us, under your seal, distinctly and openly, and this writ, so that we have them from the day of Saint Michael in three weeks, where-soever we shall then be in England, that the said record and process being inspected, we may further do thereupon for the correcting the error, that which of right, and according to the law and custom of our realm of England, ought to be done. Witness, Thomas, Archbishop of Canterbury, and the rest of the guardians and justices of the kingdom, at Westminster, the eighth day of July, in the thirteenth year of our reign.

LAYTON.

Case 192.

Booth against Johnson.

A declaration in *assumpsit*, alleging, that the defendant, in consideration the plaintiff would receive such children into his house as *guests*, and find them necessaries, promised to pay, and averring that he did receive them into his house, and found them *necessaries*, is good, without saying he received them as *guests*.

S. C. 2. Ld.

Ray. 838.

S. C. 3. Ld.

735. Fitzg. 302.

ASSUMPSIT. The plaintiff declared, that in consideration the plaintiff's testator did, at the request of the defendant, receive as *guests* into his house such children, and find them necessaries, he the defendant promised to pay the plaintiff's testator what it should come to.

The defendant pleaded the statute of Limitation ill.

The plaintiff demurred, and had judgment in common pleas:

And a writ of error thereof was brought here; and common error assigned.

BRODERICK for the plaintiff in error. The agreement was to receive such children, *ut hospites*, into the testator's house, and to find them necessaries; and the averment is, that he received them into the house and found them necessaries, without saying that he had received them *ut hospites*, and the law annexes several substantial privileges to the condition of an *hospes*; so that to receive one generally into a house and to find him necessaries is very different from receiving him as *hospes*, and therefore the agreement is

Ray. 7. S. C. Lilly Ent. 478. S. C. Salk. 25. Ante, 87. Ld. Ray. 152. 719 Stra. 592.

not pursued. A *quest* is a distinct thing from servants, apprentices, &c. ; and yet, as it is averred here, it might be, that they were received as servants or apprentices ; and where one declares upon an express agreement, he must bring himself expressly within it. The cases in 2. *Leo.* 53. 72. 1. *Saund.* 6, 7. 1. *Sid.* 309. *Yelv.* 87. 175. 2. *Cro.* 245. *Jones*, 441. are all upon variances from the agreement.

Booth
against
Johnson.

PARKER *contra* quoted *Dr. Cleland's Case* (a), where the plaintiff declared, that the defendant, in consideration that he would do all his *commands honestly* and truly for the space of a year, promised to pay to the plaintiff ten pounds, and that he had done all his *honest commands* ; and after a verdict for the plaintiff, it was assigned for error, that the promise was, that he should do all his *commands honestly*, but that the declaration was, that he had done all his *honest commands*, and that he might have done his *honest commands*, but not done them *honestly*, yet the declaration was held good.

* HOLT, Chief Justice. None of your cases come up to the case in question ; for the case of *Hargrave v. Rogers* (b) was thus : A. bound himself in a bond, with a condition, that a third person should appear to an action upon eight days warning, and that, if he were condemned, he would answer the condemnation ; the third person appeared in an action without eight days notice, and was condemned ; that shall not forfeit A.'s bond ; for he being a third person, cannot do an act to alter the terms of A.'s agreement : as if A. be bound to B. to pay him a hundred pounds, B. may take any collateral satisfaction for it ; but if the condition were to pay C. a hundred pounds, there C. shall not receive any collateral satisfaction to save the bond ; for he cannot alter the terms of an agreement made between strangers. And as to *Leate's Case* (c), the consideration is, that the plaintiff shall procure J. S. to renounce administration ; so there is an act to be done by J. S. to entitle himself to an action ; for if he do nothing, though the other renounces administration, he has no cause of action ; for the agreement was not to pay so much money if the other renounced administration generally, but if J. S. procured him to do it ; so that case quite differs from this. And as to the *Case of St. Catherine's Hospital*, which you quote out of *Leonard* (d), the agreement must have been thus : In consideration that A. at the special instance and request of B. would build a house for B. that then B. would pay him so much money for it, and in his declaration he says, that he did build the house, but does not say he did it at the request of B. ; and he needed not to do it, for the agreement was not, that he should build a house when the defendant did request him, but the agreement was absolute to build a house ; and to that agreement he was brought at the request of the de-

6. Mod. 227.
259.

(a) Poph. 193.

(b) Cro. Jac. 45. Yelv. 52.

(c) W. Jones, 441.

(d) 2. Leon. 52. — See also *Elfee v. Gateward*, 5. Term Rep. 143.

Boote
against
Johnson.

6. Mod. 227.

* [145]

defendant; and he quoted the case of *Berrisford v. Woodroffe* (a), and the case of *Pointer v. Pointer* (b), in consideration that the plaintiff, at the request of the defendant, would marry the defendant's daughter, he promised to give him so much money, and the plaintiff in his declaration avers, that he did marry her, without saying, that it was at the request of the defendant, and held to be well in itself, without any request, or help of a verdict. And he put a case where the agreement was, that the plaintiff should put his son as an apprentice to the defendant for seven years, and that the defendant should find him meat, drink, and clothes, and the plaintiff brought his action against the defendant, * without averring he had put his son to him for seven years, and held, that the action did not lie; for there it was part of the agreement, that he should put his son to him, and the defendant was not to provide for him if he had not been put to him as an apprentice for seven years (c). The case of *Rock v. Rock* (d) was, he said, against all reason, and if the very case in terms were to be judged over again, he would be of a contrary opinion to it; for it was to pay so much money before the plaintiff did take his next journey to London; and the exception taken was, that the plaintiff had not averred that the journey mentioned in the declaration was the defendant's next journey after the agreement; for if it were the next, then, by their own confession, the action lay; and if it were not the next, then there was another journey before, and then too the action well brought. And he put the case of *Tate v. Lewen* (e), in consideration that the plaintiff's intestate, at the request of the defendant, did find him *diversa vestimenta et omnia materialia adinam spectant*. he promised to pay him all that he should reasonably deserve for the same, and the plaintiff brings an action, and avers, that he did find *diversa vestimenta et necessaria præd.* and not a word mentioned of *necessaries* before, but only *materialia*, and that he deserved so much for them, yet it was held good: and this was upon a judgment by default moved in arrest of judgment, upon a return of a writ of enquiry of damages. In the case of *Johnson v. Abington*, in *Stiles* (f), which is the best reported case in the whole book, for it is plainly and sensibly reported, the agreement was, that in consideration the plaintiff would deliver to the defendant's son so much ware as he should desire, the defendant promised to pay what they should be worth, and the plaintiff avers in his declaration, that he did deliver such goods to the defendant's son, which were received by him, without saying it was at his desire; and that was held good, without any request, or help of a verdict; for the acceptance of the son is tantamount to a desire, though he never did desire him. So here is an agreement, that in consideration that the plaintiff would take into his house the defendant's children to be his guests, the defendant would pay him for their diet what it should be worth; and the breach assigned is, that he

(a) Cro. Jac. 404.

(b) Cro. Car. 194.

(c) 2. Salk. 5. 6.

(d) Yelv. 175.

(e) 2. Saund. 374.

(f) Stiles, 163.

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did take them into his house, and did diet them, &c. without saying that they were as *hospites*; but surely the thing speaks itself, and they shall be intended to be as *guests*, if the contrary do not appear on the other side. And if the word *hospes* had not at all been in the agreement, * it would be intended, *prima facie*, that he was to receive them as *guests*, yet upon the evidence that he agreed to take them into his house, and find them meat and drink, he could not be nonsuited; and the averment is full and complete as can be; and it would be a very foreign intendment to take them to be *servants* or *apprentices*, or other than *guests*; and if such a thing were, it ought to have come on the other side.

BOOTH
against
JOHNSON.

* [146]

POWELL, *Justice*. In this very case it was held, in the court of common pleas, that to take one into his house, and find him with necessaries, was to receive him as a *guest*, as much as if it had been so expressed, for the words import so much; and if it were not so, the defendant should have come with a *bene et verum est*, and confessed the receiving and finding necessaries, but alledging that they were there as *servants*, &c.

And the judgment affirmed PER TOTAM CURIAM.

Sir Richard Rains *against* the Commissary of the Diocese of Canterbury. Case 193.

ROGERS, a seaman, died beyond sea: the place of his habitation, while in *England*, was *Sandwich*, within the diocese of *Canterbury*, and he had *bona notabilia* in other dioceses within the province of *Canterbury*.

The right of granting administration may be tried in an *indebitatus assumpsit* for the fees.

The commissary of the diocese commits administration to the wife, and a creditor of the intestate is set up in THE PREROGATIVE-COURT to cite in the woman to have her administration repealed.

To this suit a *prohibition* was moved for, and a rule *nisi* today.

And now the Judge of the prerogative-court alledging that this was in derogation of his jurisdiction, which he desired to maintain; and it appearing on the very suggestion that there were *bona notabilia*; IT WAS URGED, that that was a confession that the administration committed by him was void, and none ought to be prohibited to repeal a void administration.

1. Roll. Abr. 408.
1. Lev. 78.
2. Lev. 86.
3. Mod. 324.
3. Salk. 70: 164.
- Fitzg. 303.
- Ld. Ray. 86.
265. 363. 562.
585. 836.
8. Mod. 244.
1. Peer. Wms. 43. 766.
3. Peer. Wms. 371.

HOLT, *Chief Justice*. We do not prohibit you from committing administration, which you may do if the administration committed by the commissary be void, as you say; but we prohibit the repealing of an administration which for aught we know is duly committed; and if it be by the archbishop, *quatenus* he is a metropolitan, though there be no *bona notabilia*, it is good till repealed; and if it be void, he may commit a new administration

* [147]

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Sir
RICHARD
RAINS
against
THE
COMMISSARY
OF THE
DIOCESE OF
CANTERBURY.

without any more ado, and then let the two administrators contend the matter between them; but we will not repeal this, because it is in derogation of your jurisdiction below; for you yourselves would commit it to this person that now has it. But all the question is, Whether you or they ought to grant it of right? And where you both pretend right, it will be hard to let you be your own judge; and all depends upon the constitution of the province of *Canterbury*; for if there be such a usage for them to grant prerogative administration, it is hard to hinder them of it; and the matter being thus, it is fit a *prohibition* should go, and then we will give judgment final, and then you may bring writ of error if you please.

And here it was said, that if administration be committed in a diocese where there are *bona notabilia*, though such grant be *ipso facto* void, yet they do not grant a new administration in THE PREROGATIVE-COURT before they repeal that, and in that case they shall not be prohibited; but this here is different, being a question of right.

At last it was proposed as an expedient to try the question, that Sir Richard Rains should bring an action on the case against the commissary for granting a prerogative administration to the prejudice of his jurisdiction, or that he should bring an *indebitatus assumpsit* for the fees, as for money received to his use.

And the last was done by consent (a).

(a) See Sir William Saunderson v. Salk. 330. Mayor of Exeter v. Tremlet, Bignal, 2. Stra. 747. Duppa v. Gerard, Salk. 78. Stockhold v. Collington, 2. Will. 95. Steward v. Baker, 1. Term Rep. 618.

* [148]

Cafe 194.

Taylor against Rains.

The Court will prohibit the spiritual court from granting probate of a will made by a *feme-covert*, although by marriage-articles she was authorized to make an appointment.

Comb. 242.

Ch. Caf. 25. 237.

Hob. 276.

2. Sid. 52.

2. Vent. 79.

7. Show. 92.

2. Show. 247.

1. Salk. 339.

3. Salk. 63.

4. Co. 60.

Hard. 463.

A WOMAN before marriage had articles of settlement made with her intended husband to this purpose:

She being possessed of a lease for years, the articles were, that such person should have the profits of the said term as the wife should by writing under her hand, or by her last will, appoint. The woman, the day before her marriage, made a will, devising the trust of the term to B. and then married; and after her death, the executor appointed in that will would prove it in the spiritual court.

The husband moved for a prohibition, upon a suggestion, that she was a *feme-covert* at the time of her death, and therefore could not make a will or executor. 4. Co. Forfe and Hemblinge's Case.

And it was agreed now by THE COURT and THE BAR, that a *feme-covert* can make no will, but either as executrix, or by consent of her husband, or of such goods and chattels as by marriage are

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are not given to the husband; and that likewise by consent of the husband.

And it was agreed by THE COURT, that this will, though in pursuance of a settlement of articles before marriage, was not such a will of which they had any jurisdiction below, but it amounted to an appointment in equity, who should have the trust according to the said articles (a).

And IT WAS FARTHER ADJUDGED, that if one has the trust of a term for years, and dies intestate, his next of kin shall have administration of it, and administration may be granted *quoad*, &c. as well as an executor may be *quoad*.

And IT WAS LIKEWISE DECLARED, that the way here had been, to grant administration to them to whom she had appointed the trust, and not to proceed by way of probate of will.

And THE COURT held, a prohibition might go after sentence in this case,

TAYLOR
against
RAINE.

Equity shall have cognizance of appointments.

2. Com. Dig. "Chancery" (2. F.).

Next kin shall have administration of a trust-term.

Appointee must take administration.

Ante, 137.

6. Mod. 152.

(a) See 1. Brown C. C. 147.

Hart against Longfield,

Case 195.

INDEBITATUS ASSUMPSIT. There were several counts in the declaration; and demurrers to some, and issues taken upon others.

One of the counts, to which there was a demurrer, was this: The plaintiff declared, that whereas such a day and year the defendant was indebted to him in such a sum for nourishing Edward Longfield, at the request and instance of the defendant, and that he, the defendant, promised to pay him. There was also a *quantum meruit* for nourishing the said Edward Longfield for the same time.

An *indebitatus assumpsit* lies for boarding a stranger at the defendant's request.

S. C. 2. Ld.

Ray. 841.

1. Salk. 218.

Ld. Ray. 982.

THE FIRST EXCEPTION was, That an *indebitatus assumpsit* did not lie in the case; and to prove this the case of *Sands v. Trevilian* (a) was cited, where A. desired B. to be attorney for J. S. and undertook to pay him his fees, and such fees as he should give to Counsel; and it was adjudged, that an *indebitatus* would not lie against A. And also the cases of *Herison v. Burridge* (b) and *Roxer v. Roxer* (c),

THE SECOND EXCEPTION was, That the first declaration being an *indebitatus* for nourishing of Edward Longfield for such a time, there is likewise a *quantum meruit* for the same nourishing, and it is contradictory, that there should be one agreement to pay so much as it should be worth, and another to pay a sum uncertain, and both stand.

Several satisfaction cannot be demanded in the same declaration for the same thing.

1. Salk. 213.

(a) Cro. Car. 107. 194.—But see *Antrosc v. Rowe*, 2. Show. 421.

(b) Moor, 701.

(c) 2. Vent. 36.

HOLT,

HART
against
LONGFIELD.

Ante, 106.

* HOLT, Chief Justice. There cannot be two agreements, and both stand for the same thing at the same time ; for in such case, the last will destroy the first, and the last will only stand ; but the way had been, to aver them to be different children ; and that is the right way, when a *quantum meruit* and *indebitatus* is brought for the same thing ; for here you ought to multiply *Edward Longfield* as often as you multiply your declaration.

But as to the other objection, Cannot *A.* be indebted to *B.* for doing good to *C.* ? For if *A.* should say to *B.* " Give such a quantity of goods to *C.* upon my account, and I will pay you ;" or, " Make *J. S.* a cart, and I will pay you for it ;" surely an *indebitatus* will lie against *A.* in that case. The sale properly is to him upon whose request it is given, and not to him to whom it is given : but an *indebitatus* will not lie for being an attorney to a third person, because in that case his being an attorney on record is what entitles him to debt ; and therefore, if another promise to pay, yet he for whom he is an attorney on record is not discharged, and therefore the other cannot in that case be liable to an *indebitatus*. And in the case of the cloth put before, no action lies against him to whom it is delivered, but only against him upon whose request it is sold.

And THE COURT directed the plaintiff to enter a *non prof* upon all but the first, and take judgment upon that ; and so it was done.

Case 196.

The Queen against Pigeonry.

Quoddam venenum, ANGLICE "antimony," is good.

4 Co. 446.

9. Co. 81.

Keb. 52.

Ld. Ray. 1169.

Haile P. C. 216.

218.

THE DEFENDANT was indicted, for that he did put *quoddam venenum*, ANGLICE *antimony*, into a cup of beer, and gave it to *J. S.*

THE FIRST EXCEPTION was, That "*venenum*" is Latin for the generical word *poison*, but not for any species of it, as this is.

But this exception was over-ruled upon the case of *Holton v. Rawworth (a)*.

Alchymist is not a good addition.

THE SECOND EXCEPTION was, That he was called by the addition of "*alchymista*," which was none at all.

But THE COURT would not quash it, having a fresh memory of a foul practice not long before by intoxicating physick.

(a) Hardres, 361.—This was an information upon seizure of *Canary wines*. THE INFORMATION stated them to be, " fifty-five pipas vini, ANGLICE *Canary wines* ;" and it was objected, that the particular species of the wine was not

described by any Latin word in the information. But HALE, Chief Baron, held it to be well enough ; for there is only a specification of the wine, and the general word being expressed in Latin is sufficient.

* Sylvester's Case.

Case 197.

SYLVESTER was a *French refugee*. To an action brought by him, it was pleaded *in abatement*, that he was an *alien enemy*, born under the ligeance of **THE FRENCH KING**, then in war with the queen.

"*Alien enemy*" is a good plea in abatement.

S. C. Fort. 221.

Lut. 34.

1. Ld. Ray.

282.

Dougl. 250.

1. Bac. Abr.

Svo edit. 6.

To this there was a demurrer.

And **PER CURIAM**, The plea is good (a); for though he be a poor refugee, and under the queen's protection, which enables him to sue, yet whether his protection be special, or general as by proclamations, he ought to plead it.

And **PER CURIAM**, If a writ be abateable in itself, as being for a wrong man, the defendant may say, *petit judicium de billâ*, because there the action is ill conceived; but where the writ is well conceived, but bad for *misnomer*, the defendant cannot conclude so.

A plea of *alienage* may pray judgment of the bill.

Ld. Ray. 283.

Stra. 1082.

And **PER CURIAM**, If an *alien enemy* come into *England* without the queen's protection, he shall be seized and imprisoned by the law of *England*, and he shall have no advantage of the law of *England*, nor for any wrong done to him here (b); but if he has a general or a special protection, it ought to come of his side in pleading.

If an alien enemy has a licence, it is incumbent on him to plead it.

(a) See Co. Lit. 127. 129. Dyer, 2. case of Brandon v. Nesbit, 6. Term Rep. Salk. 46. 1 Ld. Ray. 282. 1. Corn. 23. Dig. "Abatement" (E. 4.). and the

(b) See Dyer, 2.

Anonymous.

Case 198.

PER CURIAM. To have judgment signed against a *casual ejector* stand, all things must be very fair on the plaintiff's side, for the defendant loses his possession by a fictitious proceeding (a).

Judgment against casual ejector.

Ante, 118.

3. Mod. 109. 118. Stra. 531. 899. 960. 1180.

(a) The Courts will not give judgment in ejectment unless an affidavit be made that the tenant in possession was served with a copy of the declaration. By 11. Geo. 2. c. 19. "Such tenant must give notice thereof to his landlord under the penalty of three years im- proved rent: and the landlord may, by leave of the Court, make himself de- fendant with the tenant in possession, in case he appear; and in case such tenant shall refuse or neglect to appear,

"judgment shall be signed against the casual ejector; but if the landlord shall desire to appear by himself, and con- sent to enter into the like rule as the tenant, in case he had appeared, ought to have done, the Court shall permit him so to do, and order a stay of exe- cution upon such judgment till further orders."—See ante, 70. Salk. 257. 3. Burr. 1301. Runnington's Eject. 2d edit. p.

Case 199.

The Queen against King.

Forging a bail-bond to the sheriff is an indictable offence.

- S. C. Holt, 376.
- S. C. 1. Salk. 342.
- 2. Lev. 111. 231.
- 3. Leon. 170.
- 3. Salk. 171.
- 3. Salk. 342.
- Fitzg. 266.
- 4. Mod. 130.

AN INDICTMENT OF FORGERY removed up out of London, and demurred to here.

The caption was, that "*per sacramentum*" of the jury by the names "*proborum et legalium hominum, qui pro dominâ reginâ pro corpore com. præd. triat. jurat. et onerat. existentes præsentat. existit. quodd.*" the defendant, &c. "*falsò et malitiosè, &c. quodd. scriptum obligatorium fabricavit et contrafecit.*"

And several exceptions were taken.

FIRST, To the caption, there being no verb to the nominative *qui triat. jurat. et onerat. existentes*; and so it was said to be nonsense. And the case of *Rex v. Thorowbridge*, in *Trinity Term*, in the sixth year of *William the Third (a)*, was quoted, where the judgment was reversed on a writ of error, for want of a nominative case to the verb.

HOLT, Chief Justice, said, What matter is it whether a man be hanged by good or bad *Latin*; and he could shew worse *Latin* than this in many writs; as in the writ of adjournment, which runs thus: "*Rex Justiciar. suis ad placita coram nobis, &c.*"

And it was resolved by **THE COURT**, that this indictment is to be considered as if it were an indictment of *high-treason*; and if it were such, it would be good, notwithstanding the caption; for it is no uncertainty in the charge.

An indictment that he forged a false deed is good.

- 3. Mod. 122.
- Yelv. 72.
- Cro. Jac. 178.
- Cro. Car. 337.

*** THE SECOND EXCEPTION** was, That the crime charged was the forging falsely, whereas it could be no crime if it was not truly forged.

HOLT, Chief Justice. The *falsò fabricavit* is as much as to say, that "he being a false and malicious man did forge," and not that the forgery was a true forgery, but that the thing forged was not true but false.

An indictment for forging a certain false writing obligatory is good.

- 1. Salk. 342.
- 3. Salk. 171.
- 2. Ld. Ray. 920.
- 1. Show. 2.

THE THIRD EXCEPTION. If it were a forgery, it could not be *scriptum obligator.* for a forged deed is not obligatory; therefore it should be for forging *quodd. scriptum*, purporting a writing obligatory.

HOLT, Chief Justice, said, that it could not be *obligatorius* if it was forged; it is not in truth and reality binding, but in show and appearance it is, and that is enough: so it is an obligation, though a false one.

False *Latin* shall not vitiate an indictment.

- 1. Salk. 375.
- 18. 747. 901.

THE FOURTH EXCEPTION, That a forgery to the prejudice of nobody cannot be a crime; and the pretended bond could be to

- Ld. Ray. 530. 737. 921. 1464. 1523.
- Fitzg. 57. 261.
- 3. Peer. Wms. 419.
- Str. 1144.

(a) Comb. 307. 1. Salk. 371.

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nobody's prejudice; for it was a bond to the sheriff of London for the appearance of a person under arrest *à die Purificationis in octavis diebus*, and there is no such day, and therefore the bond is not according to the statute, therefore void; and by consequence the forgery no crime, because no prejudice to any.

IT WAS HELD, that the *octavis diebus* may be well understood for the *octave* of the, &c. Besides, these bonds are not merely void by the statute, but only voidable; and therefore you must plead the special matter, and not *non est factum*: and you may say, that a forged bond binds * nobody, as in truth it does not, and infer from thence, that it is no crime to forge.

And the queen had judgment, and King stood in the pillory.

THE QUEEN
against
KING.

* [152]

Brook against Bishop.

Case 200.

TRESPASS for breaking the plaintiff's close, and entering into it, treading his grass, and cutting so many trees to the quantity of ten cart-loads, and carrying them away on such a day, *transgressionem præd. continuando*, from such a time to such a time.

After verdict for the plaintiff,

IT WAS MOVED in arrest of judgment, that damages were entire, and part of the trespasss did not lie in a *continuando* (a), and yet damages were given for that too. And though it was objected, that if it could not be continued, no damage could be given in respect thereof, according to the case of *Butler v. Hodges* (b), yet under this *continuando* several new acts of trespasss might be given in evidence, and so damages recovered for them.

PER CURIAM. The right way in trespasss for repeated acts of trespasss would be, that on such a day, and *diversis aliis diebus et vicibus*, between such a day and such a day, the defendant did so and so (c). But in this case the *continuando* is impossible, and therefore no damages could be given for it; and the only mischief possible would be that of giving other acts of trespasss in evidence by pretence of it; but that ought not to be suffered, and therefore not to be intended (d).

ANOTHER EXCEPTION was, That the declaration was generally of *Easter Term*, and yet it appeared that the trespasss was committed after the twenty-first of *April*, which was the *quinden. Pasche*:

But PER CURIAM, That Term was adjourned by proclamation to the second return, which was the twenty-ninth. All declarations shall refer to that.

And here the plaintiff had judgment.

In trespass *quare clausum fregit* on such a day, and cutting trees, with a *continuando*, the *continuando* is void; and if entire damages be given, they shall be intended for such trespasss as are well laid.

S. C. 2. Salk. 639.
S. C. 3. Salk. 359.
S. C. Holt, 698.
S. C. 2. Ld. Ray. 823.
T. Jones, 194.
Skin. 42.
2. Show. 196.
5. Mod. 179.
5. Com. Dig. "Pleader"
(3. M. 10.).
Comy. 231.
Stra. 422.

If the Term be adjourned, the memorandum shall apply to the day of adjournment.
Ante, 1.

(a) See 1. Sid. 224. 1. Ld. Ray. 239. 1. Ld. Ray. 240. 2. Ld. Ray. 977.
(b) 1. Lev. 210. 1. Sid. 319. 2. Keb. Comb. 427.
(c) Year-Book 20. Hen. 6.—See also
(d) See the case of Clayton v. Gillam, 2. Show. 196. in point.

The

Case 201.

• The Queen against Foxworthy.

Pardon of murder amended, by inserting the word "*attincturas*."

FOXWORTHY was attainted of murder for the killing of one who had come in aid of the constable to arrest him upon a warrant; and having obtained his pardon, he was brought to the bar to plead it; and it being read, the word "*attincturas*" was not in.

S. C. Salk. 500.
S. C. Holt, 521.
S. C. 2. Ld. Ray. 848.
Ld. Ray. 214.
637. 709.

HOLT, Chief Justice, thereupon said, that he would consider before he would allow it.

Upon which the prisoner was remanded.

And at another time, the pardon being amended, and *attincturas* put in, he was brought up, and the pardon allowed, which was upon condition that within such a time he would repair on board one of the queen's ships, and serve three years in the *West-Indies* on board it.

A covenant may be charged with an action, if it will not frustrate the effect of a pardon.

DEE, Common Serjeant, moved for leave to charge him with an action in the custody of **THE MARSHAL**.

But because, if he could not pay the debt or find bail, the pardon might be thereby frustrated, **THE COURT** would not grant leave.

S. C. 2. Ld. Ray. 848. 2. Salk. 500. B. R. H. 190. 1. Elack. Rep. 30. 1. Will. 127. 217. Foster, 61. Tidd, 195.

Breach of the peace destroys a pardon, although it has been allowed.

Str. 473. 1203.

AND IT WAS AGREED, that if, in this case, after the allowance of the pardon, he had broke the peace, he might, notwithstanding the pardon, be detained for that offence; to the destruction of his pardon; and in such case he would be brought up here again, and asked, what he had to say why sentence should not pass; and if he pleaded the pardon, **THE ATTORNEY-GENERAL** would reply the condition and breach, &c.

Case 202.

Robinson against Walker.

A covenant that A. and B. "*convenirent pro se et quolibet eorum*" is joint and several.

COVENANT. The plaintiff declared, that the defendant and J. S. did *convenire pro se et quolibet eorum*, &c. that they or either of them would lade such a ship at such a place, and pay the plaintiff for the freight, &c.

The defendant pleaded *in abatement*; that the other covenantor

• [154] was in full life, not named in the writ.

S. C. 1. Salk. 393.
2. Co. 10.
5. Co. 53. 179.
Post. 154.
Co. Lit. 144.
3. Leon. 260.

AND IT WAS AGREED by all, that *obligamus nos et utrumque nostrum* was joint and several.

• But **HOLT, Chief Justice**, declared, that he thought there might be a diversity between "*A. et B. conveniunt et quilibet eorum*"

"convenit,"

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"convenit," and "*A. et B. conveniunt pro se et quolibet eorum*;" for in the first "*quolibet eorum convenit*" expressly severs the lien, but "*pro quolibet eorum*" seems to go to the thing to be done; that is, that they both or either of them would do it. And one may covenant, "that he or *A.* will do such a thing. So if two covenant, "that they or one of them shall do such a thing," that is a joint covenant only; and the word "*conveniunt*," and not "*pro quolibet eorum*," makes the lien.

ROBINSON
against
WALKER.

3. Peer. Wms.
405.
Ld. Ray. 1199.
1203.
Stra. 503. 553.
610. 910. 1146.

But THE OTHER JUDGES *contra*; and no difference between this and the case of "*obligamus nos et utrumque nostrum*."

And judgment was given, *quod respondeat ulterius*

• [155]

Cutting against Williams.

Case 203.

ERROR OF A JUDGMENT in the court of common pleas. The declaration contained several counts, and one of them was upon the *custom of merchants*, upon A NOTE given by the defendant to the plaintiff, promising to pay him so much money. Several damages were given, but there was only one judgment for the plaintiff below for the several damages.

If a declaration contain two counts, one upon a note of hand upon the custom of merchants, and the other upon an *indebitatus assumpsit*, and the jury give several damages, but the judgment is entered,

It was assigned for error, that the count upon the *custom of merchants* was void; and therefore there being one entire judgment, all was void, and that the judgment ought to be reversed *in toto*. And the case of *Martin v. Clerk (a)* was quoted as an authority in point.

"that the plaintiff recover his damages by the said jurors in form aforesaid assessed, which in the whole amount to so much, &c." the judgment is void *in toto*; for previous to the

NOTE here, Both the damages were cast up together, and judgment entered for them, with a *quæ in toto se attingunt* to so much, that is, *quod recuperet damna sua prædicta. assess. quæ in toto se attingunt* to so much, which total comprehends both the damages.

To maintain that the judgment ought to be reversed only in part, the case of *Jacob v. Mills (b)*, of *Peck v. Ambler (c)*, and of *Rymer v. Grimstone (d)*, were urged.

BUT on the other side was quoted the case of *Lloyd v. Pearce (e)*, a judgment in point to the contrary four years after, where the judgments are distinct and upon distinct laws; as in *dower*, where the judgment for recovery of the dower is by common law, and to recover damages by the *statute of Marlbridge*, or in a *quare impedit*; for there is judgment for the church at common law, and for damages by the *statute*; and in that case, * judgment may stand for one, and be reversed for the other (*f*). An action was brought upon several promises, and several damages assessed, and one judgment given for both; and upon a writ of error it appeared, that an action

3. & 4. Anne, c. 9. a note of hand was not within the custom of merchants; and where one of several counts is bad, and an entire judgment is given, it cannot be reversed in

part only.—S. C. 2. Ld. Ray. 825. S. C. 11. Mod. 24. S. C. 1. Salk. 24. S. C. Holt, 273. S. C. Lilly Ent. 227. Ante, 152. Hob. 6. Cro. Car. 339. Co. Jac. 343. 1. Roll. Rep. 24. Allen, 75. Ld. Ray. 1382. Fitzg. 85. 255. Stra. 1036. Dougl. 377. 730, 731.

(a) 2. Ld. Ray. 757. S. C. 1. Salk.

(d) Moor, 708.

129. 364.

(e) Cro. Jac. 424.

(b) Hob. 6.

(f) 1. Roll. Abr. 775. pl. 4. Allen,

(c) Cro. Car.

74.

did

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CUTTING
against
WILLIAMS.

did not lie for one of them, and therefore the judgment was reversed *in toto* (a). The case of *Mills v. Jacob* (b) is denied to be law, and so was the case of *Bernard v. Bernard* (c). In the case of *Antel v. Oats* (d); assault and battery was brought against three, one whereof was an infant; and all of them appeared by attorney; and judgment was given against all; and it was reversed *in toto*, because the infant appeared by attorney. The way had been to enter a *remittitur* for that which is not maintainable, and take judgment for the rest (e).

Hob. 6.
Cro. Jac. 343.
1. Roll. Rep.
24.

HOLT, *Chief Justice*. It has been held as you say in the case of *Jacob v. Mills*, but certainly ever since the Courts have been of a contrary opinion. And there are but two judgments in the books that favour that opinion of reversing judgment in part. I remember to have heard it debated here many years ago, and the Court then were of opinion, that it would be bad in the whole; for the whole judgment is wrong; for it is for more damages than should have been recovered; and not for so much damage upon one promise, and so much upon another promise; for if it were so, it might perhaps be several judgments; and in consequence one might be reversed without the other; but the judgment here is to recover "the damages aforesaid," which are the whole damages.

Allen, 75.
Cro. Car. 339.

POWELL, *Justice*, said, he had known the case of *Jacob v. Mills* denied to be law many a time, and that there are twenty resolutions to the contrary; that is, if a *remittitur* be not entered for part, that it will be bad for all; for the judgment is of the whole.

And THEY WERE ALL OF OPINION, that if one of the declarations were such on which no damages ought to be recovered, it would be bad.

Ante, 86.

HOLT, *Chief Justice*, as to the other point, said, that he had proposed it to ALL THE JUDGES, and that they were all of opinion, that a declaration upon the *custom of merchants* upon a NOTE, subscribed by the defendant to the plaintiff for so much money, or promising so much money; was void; for it tended to make a note amount to a *specialty* (f).

(a) 1. Keb. 232.

(b) Hob. 6. S. C. Cro. Jac. 343.
S. C. Jenk. 339. S. C. 1. Roll. Rep.
24. S. C. Co. Ent. 25.

(c) Mich. Term, 22. Car. 2. in the
king's bench, 2. Keb. 696. 699. 708.
716.

(d) Stiles, 121. 125. S. C. Allen,
74.

(e) 3. Keb. 199. 213. 1. Vent. 27.
39. 2. Keb. 306. 535. 2. Saund.
379.

(f) But now by 3. & 4. Anne, c. 9.
"All notes in writing made and signed
"by any person, whereby he shall pro-
"mise to pay to any other person or his
"order, or to bearer, any sum of money
"mentioned in such note, shall be taken

"and construed to be, by virtue thereof,
"due and payable to any such person to
"whom the same is made payable; and
"every such note shall be assignable and
"indorsable over in the same manner as
"inland bills of exchange; and the
"person to whom such sum is by such
"note made payable, may maintain an
"action for the same in the same manner
"as on inland bills of exchange made or
"drawn according to the custom of
"merchants, against the person who
"signed the same; and any person to
"whom such note is indorsed or assigned
"may maintain an action thereon, either
"against the drawer or indorser, in like
"manner as in cases of inland bills of
"exchange."

And

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And judgment *super inde* was reversed in toto by THE WHOLE COURT.

CUTTING
against
WILLIAMS.
* [156]
Case 204.

* Owen against Atkinson.

AFTER PLEA pleaded, and replication and rejoinder to part, and issue, notice of trial with proviso as to the other, and rule served to make up the issue, to carry it down to trial;

And the *nisi prius* roll being engrossed in parchment, but all the proceedings above continuing in paper, the plaintiff had leave to amend upon payment of costs.

NOTE here, The record of *nisi prius* was made up, though the record above was not; and that was said to be done frequently; and it is never denied to amend upon payment of costs while things continue in paper.

NOTE ALSO, A case cannot be carried down to trial by *proviso* until the issue is made up; and therefore the defendant ought to serve a rule upon the plaintiff to make up the issue (a).

(a) But the necessity of carrying a cause to trial by *proviso* is now, in many cases, rendered unnecessary, by the statute 14. Geo. 2. c. 17. which gives judgment as in case of a nonsuit, if the plaintiff do not proceed to trial according to the practice of the court.—See Proude &

Williams, 1. Bar. K. B. 18. Dodson v. Taylor, Stra. 1055. Rex v. Pippet, 1. Term Rep. 492. 696. Jones v. Concanon, 3. Term Rep. 661. Humpage v. Rowley, 4. Term Rep. 767. Porzelius v. Mattocks, 1. H. Bl. Rep. 101. Tidd's Practice, 493.

Grovenor against Fenwick.

Case 205.

AFTER A TRIAL AT BAR, and verdict for lessces in ejectment, a new trial was moved for, upon the merits of the cause, and also upon an affidavit brought into court.

The affidavit contained in substance, that the defendant's witnesses were kept back by a report spread in Holland, where they were in their way to England; and that the witnesses that were already come over had been laid by the heels; but it did not name any who had spread the report, or that it was by the agents or persons employed by Fenwick.

And though THE COURT were dissatisfied with the verdict upon several reasons, one whereof was, that the trial lasted above sixteen hours, and abundance of evidence was given on both sides, and the jury were agreed on their verdict in half-an-hour's time, yet THE COURT would not grant a new trial. And the case of Gay v. Crofs (a), heretofore, was remembered; for the Court declared, that after A TRIAL AT BAR they would not easily grant

The Court will not grant a new trial after a trial at bar, except for the misbehaviour of the prevailing party towards the jury or witnesses.
S. C. ante, 121.
156.
S. C. 1. Salk. 258.
S. C. 2. Salk. 650.
S. C. Holt, 165.
Ante, 37. 70.
121.
5. Mod. 88. 350.
6. Mod. 18. 22.
307.
Ld. Ray. 514.
1159.
Gilb. Eq. Rep. 2.
Stra. 1105. 1142.

(a) Ante, 37.

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a new

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GROVEKOR
against
FENWICK.

a new trial, more especially in ejectment (a), where the first verdict is not peremptory, and where there is no foul practice made appear in the jury or party for whom the verdict was; as keeping back of witnesses, &c. ; in which cases alone it was discretionary in the Court to grant it (b).

The Court will not permit an affidavit to be amended after the fact required to be attested is disclosed to the deponent.

AND HERE they begged leave to mend their affidavit;

Which was opposed for this reason, that now they had learned of the * Court what would do their business, it would be dangerous to let them in to swear it.

To which HOLT, *Chief Justice*, said, that it was frequent in chancery, after a witness had sworn before a master, to examine him again *viva voce* in court.

* [157]

But POWYS, *Serjeant*, replied, that it was no frequent thing to do; for in all his time he had known it done but twice.

And POWELL, *Justice*, declared his dislike of mending affidavits, where the party knew before what was necessary, and had not sworn it (c).

(a) But see instances of new trials granted after a trial at bar, *Stiles*, 462. 466. 1. *Stra.* 534. 2. *Ld. Ray.* 1358. 2. *Stra.* 1105. 1. *Burr.* 395.—So also in ejectment, 4. *Burr.* 2224.

(b) See 1. *Stra.* 643. 2. *Salk.* 645.

Bull. N. P. 326. 1. *Term Rep.* 11. 2. *Term Rep.* 281.

(c) It is said, that a new trial was denied; but that it was against the opinion of the *Chief Justice*, S. C. 2. *Salk.* 650.

Case 206.

Cooper against The Hundred of Basingstoke.

Easter Term, 13. Will. 3. Roll 431.

If a person be assaulted by thieves in the hundred of A. and carried into the hundred of B. and there robbed, an action lies on the statute of *Hue and Cry* against the inhabitants of the hundred of B.

AN ACTION against the hundred upon the *statutes of Winchester* (a), of HUE AND CRY. A special verdict was found at the assizes to this effect:

The plaintiff was travelling in the highway, within the hundred of *Michel*, in the county of *Devon*, and was there assaulted and set upon by several malefactors to him unknown, who took possession of him, and carried him into a coppice hard by the said highway, in the hundred of *Basingstoke*, and there robbed him.

The question was, Whether the hundred of *Basingstoke* be chargeable with this robbery?

This case was argued several times at THE BAR.

S. C. 2. *Salk.* 614.

S. C. 11. *Mod.* 2.

S. C. Holt, 638.

S. C. 2. *Ld. Ray.* 326.

3. *Salk.* 134.

4. *Mod.* 383.

HOLT, *Chief Justice*, now, this Term, declared the unanimous opinion of THE COURT, that the hundred of *Basingstoke* is chargeable. It has been endeavoured to be maintained, that this robbery was committed in the hundred of *Michel*; but it is most plain upon the

184. 1. *Show.* 60. 5. *Mod.* 150. 160. 263. 2. *Salk.* 613. 3. *Mod.* 258. 237. 2. *Saund.* 379. 423. *Comy.* 327. 345. 478. *Stra.* 406. 1170. 1247.

(d) 13. *Edw.* 1. ft. 2. c. 1.; and 2. and 28. *Edw.* 3. c. 11.

words

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against
THE
HUNDRED OF
BASINGSTOKE.

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Hale, 54.
1. Co. 99.
5. Co. 21.

words of the verdict; that it was wholly committed in the hundred of *Basingstoke*; for without all question, if these had been two counties, as they are two hundreds, and he had been taken in one county and carried into the other; and there robbed, the robbers must have been tried where the robbery was committed. Now then, if the robbery be committed in the hundred of *Basingstoke*, by the express words of the statute it is chargeable, so that the hundred where the robbery is committed shall be liable to make satisfaction for the robbery. Now it is impossible in this case to make the robbery committed in the hundred of *Basingstoke* to be a robbery from the time of the assault, which was in the hundred of *Michel*, in *Devon*, for there is no manner of reason to make a relation in this case; for it is no way like the case of murder, where the stroke is on one day; and the death on the other; there, to some purposes, there is relation to the first day, but not to all purposes. It has relation to make all the lands the party had at the time of the stroke given escheat, and to forfeit his estate for life to the king; but to other collateral purposes it has not any such relation: for if a man be indicted, for that he gave a mortal stroke to *A.* on such a day, whereof he languished until such a day, and so the jury does say, that the party indicted did murder the party slain on the day of the stroke given, it will be bad; but they may conclude that he killed him on the day of his death (*a*). In this case, there is no robbery committed until the plaintiff is in the hundred of *Basingstoke*; for there the taking away is, which is the fact that makes the hundred chargeable. Besides, in the case before put of the relation, if *A.* give a mortal wound to *B.* on the third of *March* suppose, whereof the party dies the last of *March*, between these two days *C.* has received and comforted *A.* or, if a constable had him in his custody, and suffered him to escape between the two days, *C.* should not be accessory to the felony, nor the constable guilty of the escape of a felon (*b*). The pardon of "all offences and misdemeanors" after the stroke, and before the death, pardons the murder that follows; that is, Suppose a pardon be of "all offences committed by him before the tenth of *March*," that pardons the stroke; and by consequence the murder that ensues by the death of the party; but in our case, there is not any colour for a relation: for the assault is not the immediate and efficient cause of the robbery; but is only the occasion or cause *sine qua non* of it; therefore there is no necessity of a relation to it; and if there be no relation, then of necessity that hundred must be liable where the fact is committed; and that is the hundred of *Basingstoke*. This is not a new case, but has been determined already. In *Dean's Case* (*c*), *A.* is assaulted in one hundred, and flies into another hundred, and being still pursued by the robbers in pursuance of the assault, he is there taken and robbed; there is as much reason to make this robbery

(a) 4 Co. 41.

(b) Year-Book 11. Hen. 4. pl. 49.

(c) Hutton, 125.

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against
THE
HUNDRED OF
BASINGSTOKE.

1. Goldsb. 155.

2. Goldsb. 280.

relate to the first assault as there is in our case; and there it is held, that the hundred in which he was robbed should be only charged, that is, the hundred in which the actual taking away was. * The case in *Goldsbrough* allows this to be law: Thieves came upon a carrier and seized on him and his horses, and drove his horses into another hundred, and there they rifled his waggon; and the hundred where the rifling was was not chargeable, because it was a complete robbery, by taking the carrier and the horses into their possession; and the rifling after does not make it a greater robbery than it was before; but if the carrier had been left in possession of his waggon and horses, and only obliged to lead into that place, and there the goods had been taken from him, there the place where the goods were actually taken from him had been chargeable. But the true reason why the hundred of *Basingstoke* stands charged is this: It is to be known, that the hundred is not charged because they did not prevent the robbery, but because they have not taken the malefactors after; for let the mischief be ever so great, if they apprehend the malefactors within forty days, as the law stands now (a), heretofore within half-a-year, they shall not be charged: then here is no obligation on the hundred of *Michel*, in *Devon*; for there was no robbery committed there, and the robbery and charge does not come upon the hundred until it be completed and consummate, and they fail of taking the robbers within the time limited; and for that default they are charged, and not because of any robbery committed. The hundred is not bound to pursue a man for an assault, nor for a battery even to death, nor shall they incur any forfeitures for not apprehending such offenders; and in this cause, there was nothing done in the hundred of *Michel* but the assault; and if there be no obligation on the hundred of *Michel* to take the robbers, then of necessity the hundred of *Basingstoke* must do it, because the one or the other must. It is said, that suppose an assault be made in one hundred by day, and the party is carried into another hundred, and kept till night, and then is there robbed in the night-time, it is not reasonable in that case, that the hundred where the robbery is committed should be charged, because the robbery is by night. But I answer, that the remedy fails there, because there is no reason to charge the hundred where the robbery was committed, because it was by night. So if he be taken in the highway by * day, and carried into a dwelling-house within the hundred, and there robbed, the action fails, because the hundred is not answerable for robberies committed in a dwelling-house; but if he had been carried from the highway into an empty waste house, and there robbed, I will not deliver any opinion how that would have been. And he said, they were all of opinion, that the hundred should be liable for a robbery committed in a private way.

• [160]
Oth. Car. 267.

And by THE WHOLE COURT, judgment was given for the plaintiff.

(a) By statutes 13. Edw. 1. c. 1. and ch. 12. f. 7. &c. and the statutes 27. Edw. 3. c. 11. — See also 3. Lev. 320. c. 18. and 8. Geo. 2. c. 16.
2. Saund. 376. 3 Hawk. P. C. 7th edit.

**A
COLLECTION OF CASES**

ARGUED AND DETERMINED IN

THE COURTS

OF

KING'S BENCH, COMMON PLEAS,

AND

CHANCERY;

FROM

EASTER TERM,

THE

SIXTH YEAR OF GEORGE THE SECOND,

TO

EASTER TERM,

THE

TWENTIETH YEAR OF GEORGE THE SECOND.

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E A S T E R T E R M,

The Sixth of George the Second,

I N

The King's Bench.

* * * * *, *Chief Justice (a).**Sir Francis Page, Knt.**Sir Edmund Probyn, Knt.**William Lee, Esq.**Sir Philip Yorke, Knt. Attorney General.**Charles Talbot, Esq. Solicitor General.*} *Justices.*

(a) LORD RAYMOND, *Chief Justice*, directed to MR JUSTICE PAGE, and dying in the Vacation, there was at this time no Chief Justice, and all writs were *issued in his name.*

Maccarty against Barrow.

Case 207.

MR. FOWKES moved to discharge the defendant, who was in execution at the plaintiff's suit. The motion was founded on a certificate under a commission of bankruptcy, obtained before the twenty-fifth of *March* last, according to the statute 5. *Geo. 2. c. 30. l. 22.*

A bill drawn before a bankruptcy, though not protested till after, is a debt, and may be proved under the commission against the drawer.

The fact, upon shewing cause, appeared to be this:

The action was brought upon several bills of exchange to a considerable value, which were drawn by the defendant, in the month of *December* 1728, upon a merchant at *Bilboa* in *Spain*, payable to the plaintiff, and by him immediately transmitted to *Spain* in order to be accepted by the person on whom they were drawn. The drawee refused to accept them, and upon his non-acceptance they were protested, and transmitted again to the plaintiff in *England*, in the month of *February* following, who brought this action against the drawer. But between the time of drawing these bills and the time of applying to the defendant for the payment of them, after they had been protested for non-acceptance, viz. the thirteenth of *January* 1728, a commission of bankruptcy

S. C. 2. Stra. 949.
S. C. 2. Bar. K. B. 251. 255.
S. P. 2. Kel. 239.
S. C. 3. Will. 17. S. C. Cook's B. L. 237. Cowp. 543.

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issued against the defendant, under which he had not regularly obtained the certificate, which was now produced to the Court.

MR. STRANGE for the plaintiff insisted,

FIRST, That the plaintiff's cause of action did not accrue until after the issuing of the commission, &c.; that the drawer of these bills was not chargeable until there had been a tender of them to the person on whom they were drawn, and non-acceptance by him and a regular protest; and therefore, as the cause of action was subsequent to the commission, the plaintiff could not have come in as a creditor under the commission, and consequently that this certificate will not affect the plaintiff's demand.

The Court may,
on motion, discharge a bankrupt illegally arrested.

SECONDLY, He insisted that this Court had no power to discharge the defendant in this summary way, but that the party's remedy was by *audita querela*. He admitted, that by the 6. Geo. 1. c. 22. there was such a provision made for the discharge of the bankrupt in this manner where judgment was obtained against the bankrupt before he had his certificate; for that being *casus omissus* in the 5. Geo. 1. c. 24. was remedied by the 6. Geo. 1. c. 22.; but the 6. Geo. 1. c. 22. was a temporary act, and is expired; and the late statute of the 5. Geo. 2. c. 30. refers to the 5. Geo. 1. c. 24. only, and therefore there is no power in the Court now subsisting to discharge the defendant in this case.

To hold a certificated bankrupt to bail, the plaintiff must shew good cause of action.

THIRDLY, He insisted, that the defendant ought to make it appear that these bills of exchange were given before any act of bankruptcy committed, and it is not sufficient to shew they were drawn before the issuing of the commission. The act of bankruptcy might be committed several years before the commission issued, and that being once committed can never be purged; and if they were drawn between the time of the act of bankruptcy and the date of the commission, there can be no pretence for this application; no act of parliament whatsoever making any provision for the discharge of the bankrupt in any other case than when the debt for which the action is brought was contracted before the act of bankruptcy committed, and not before the issuing the commission.

MR. FOWKES, for the defendant, insisted,

FIRST, The objection, that the plaintiff could not come in as a creditor in this case under the commission, because his cause of action against the defendant was subsequent to the time it issued, is unfounded, for the defendant, in this case, became immediately a debtor to the plaintiff upon drawing the bills; this was *debitum in presenti* though *solvendum in futuro*, and is a case clearly within the provision of the 7. Geo. 1. c. 31. which enables creditors of a bankrupt, for money payable to them at a future day, to come in for their proportion of the bankrupt's estate, discounting their securities after the rate of five pounds per cent. per annum.

SECONDLY,

SECONDLY, I admit there are in the 5. Geo. 2. c. 30. no relative words to the 6. Geo. 1. c. 22. upon which this power of discharge is founded; but that power is originally inherent to this Court by the principles of the common law, and therefore no such words of reference were necessary to give this Court a jurisdiction in this case.

Maccarty
against
Barnes

THIRDLY, As to the last objection, It is to be presumed that the act of bankruptcy was committed about the time of issuing the commission; and if the bills were drawn after the bankruptcy committed, that is a fact which the plaintiff ought to make out for his own benefit.

MR. STRANGE in reply. The 7. Geo. 1. c. 31. extends to securities only, payable at a future day, which are taken upon the sale of goods and merchandizes, as appears by the preamble of the act, and the words "such securities, &c." and this does not appear to be a case within that act.

Ld. Ray. 1549.
2. Peet. Wimp.
396.
Cooke's B. 1.
234.

PROBYN, Justice. It seems clear that the drawer of these bills was a debtor by relation from the time they were drawn (a).

LEE, Justice, was of the same opinion. He held likewise, that the 7. Geo. 1. c. 31. extended to this case; for though the preamble mentions only "securities for the sale of goods and merchandizes, &c." yet the enacting part is more general, and comprehends all sorts of securities payable at a future day.

THE COURT held likewise, that it was incumbent on the plaintiff to shew that the bills were drawn after the bankruptcy was committed, if he would have advantage thereof.

The defendant was accordingly discharged (b).

(a) Therefore, if a drawee refuse to accept a bill of exchange, an action will lie against the drawer of it before it becomes payable, Bright v. Purrier, Bull. N. P. 269. S. P. Milford v. Mayor, Dougl. 54. So the indorsee of a pro-

missory note may be discharged under an insolvent act before the note is due, Harman v. Leake, Cowp. 22.

(b) See the case of Chilton v. Whiffin, 3. Will. 13.

Hearne against Bulshell.

Case 208.

A WRIT OF ERROR having been brought in the court of king's bench on a judgment had in the MARSHALSEA COURT, and the judgment below being affirmed, and a new writ of error *coram vobis* being now brought;

A writ of error *coram vobis* is not a *superfideus* after affirmation.

MR. PARKER moved, that this writ of error might be quashed, and the defendant in error be at liberty to take out execution; the last writ of error being illegal, as it lies only by abatement by death, &c.

S. C. 2. Stra. 949.

S. C. 2. Kely. 105.

S. C. 2. Barn. 253. 260.

279. 5. Com.

Stra. 699. 1. Salk. 321. Barnes, 205. 209. 2. Bl. Rep. 1183. 1. Term Rep. 279. 5. Com. Dig. "Pleader" (3. B. 12).

MR.

HEARD
by the
Court

MR. STRANGE, on the other side, cited the case of *Thompson v. Hunt (a)*; which was a judgment obtained in THE PALACE COURT, on which a writ of error was brought in the court of king's bench, and the judgment affirmed; and afterwards a writ of error *coram vobis* was brought, and *coverture* in the defendant assigned for error; and it was moved to quash the writ of error upon an affidavit that this very defence was used at the trial, and a verdict notwithstanding against the defendant; but the motion was denied.

PAGE, Justice. That case is very different from the present; for *coverture* having been pleaded in this action in the court below, and yet a verdict given against the defendant, it appears judicially to us upon the record that that matter has been tried below; otherwise in the case cited.

At another day,

MR. PARKER, for the defendant in error, insisted upon the distinction taken by PAGE, Justice, and that the proper time for taking advantage of any error in fact was upon the first writ of error, and not having done it at that time the plaintiff is precluded. It has often been determined, that after an affirmance in the exchequer chamber of a judgment given in the court of king's bench, and a *remittitur* of the record into the king's bench, error *coram vobis* does not lie (b).

MR. STRANGE, on the other side, cited *Salk. 337. Show. 349. Felo. 117. 1. Roll. Abr. 754. pl. 15.*

THE COURT was clearly of opinion, that the allowance of a writ of error *coram vobis* was a matter of discretion in them, and not a writ of right; and that there could be no reason to allow this, it appearing upon the pleadings that this matter had been already determined by THE JURY, and was a matter proper for their determination.

LEE, Justice, cited 1. Vent. 207. 1. Mod. 285. Carth. 357, and the case of *Butler v. Muntamos, 4. Geo. 2.*

The writ of error was quashed.

(a) Easter Term 4. Geo. 2. case of *Lambell v. Pretty John, Hilary Term, 12. Geo. 1.*
(b) 2. Lev. 38. 3. Keb. 28. and the

Case 209.

The King against The Mayor of Evesham.

On a mandamus to proceed to the election of an alderman, the Court will not give any directions respecting the time of election; for that must be governed by the constitution of the city.—S. C. Str. 949. S. C. Bar. K. B. 236. 265.

A MANDAMUS having been granted to the mayor of Evesham to proceed to the election of an alderman,

MR. WILLES moved, that this Court would restrain the execution of this writ to some particular time, suggesting that the corporation would proceed to an election in the absence of several members

members who were desirous of being present at the time; that by the charter forty hours notice is required to be given of the intended election; that it is impossible several of the members, particularly Sir John Lubbock, who was now engaged in parliament, could attend the election; that they desired only some particular day might be agreed on for the election, to enable the absent members to attend; and hoped this Court would interpolate to prevent any surprize of this nature.

But THE COURT held clearly that a *mandamus* is a writ of right; that the Court has no power of prescribing any time for the election; for if the election be made agreeably to the charter and according to law, it will be good though those persons did not attend: on the other hand, if there were any illegal surprize or other misbehaviour in the corporation, in the manner of their proceeding to an election, then it might be proper to call in the assistance of this Court; but they could not presume anything of this kind; or make any cautionary provision against it.

The motion was accordingly denied.

THE KING
vs
THE MAYOR
OF EYNSHAM.

Gambier against Wright.

Case 210.

THIS WAS A WRIT OF ERROR brought upon a judgment in the common pleas in debt for an escape. The declaration set out, that the plaintiff brought an action against a third person in the court of king's bench; that the party was arrested thereon, and in custody of THE MARSHAL; that by *habeas corpus* he was removed from thence, and upon return of the *habeas corpus* before Mr. JUSTICE DENTON, was by him committed to the custody of the defendant, THE WARDEN of the Fleet.

If a prisoner be removed from the King's Bench prison to the Fleet, and escape, a declaration for such escape need not shew process against him in the common pleas.

HAWKINS, Serjeant, for the plaintiff in error, insisted, that it ought to appear there was some action depending in the court of common pleas, to warrant this removal by *habeas corpus* and commitment to THE FLEET, for otherwise it was a void commitment; the defendant in the action was never legally in custody; and consequently this is not such an escape for which an action lies against the defendant. He cited 1. Roll. Rep. 217. Cro. Car. 223. 31. Hen. 6. 10. Lut. 1468. Moor, 278. 2. Lev. 84. 2. Bulst. 62. 1. Cro. 877. 2. Cro. 394. 1. Roll. Rep. 276. Salk. 273. 700.

S. C. Stra. 951.
S. C. Bar. K. B.
257.
S. C. 2. Kely,
115.

SECONDLY, The commitment is here to the defendant in his personal capacity, whereas it ought to be *prison de la Fleet*, and so are all the precedents.

MR. DENNISON on the other side. The presumption is, that the Judges of superior courts have acted according to law, and therefore it must be intended that in this case there was a proper foundation for the commitment. It is not necessary to set forth the action in the record; the plaintiff in this case is a stranger to the proceedings in the common

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common pleas, upon which the removal by *habeas corpus* was grounded, and therefore they cannot be set out by him. There are numberless precedents for declaring in this manner, *Lea, Ent.* 56. *Vid.* 181. 204. 2. *Brownlow*, 13, 14. *Robinson*, 307. *Lilly*, 157. 188.

As to THE SECOND OBJECTION, In point of reason there is no difference between a commitment to the warden, &c. or to the Fleet; there are likewise precedents of commitments in this manner, *Lilly's Entries*, 157. *Vid.* 104. *Robinson*, 302. The statute of the 8. & 9. *Will.* 3. c. 26. makes no difference of expression between commitments to the marshal of the King's Bench prison, and warden of the Fleet; which shews the sense of the Legislature to be, that there was no material difference; but besides it is a settled principle of law, that all judgments, given by any court, are not void, but voidable only; and, if voidable only, the plaintiff cannot take advantage of that. *Carth.* 148. 5. *Mod.* 19. *Soli*, 372.

Judgment nisi for the defendant in error.

CASE 210

Gambell against Wright

THIS WAS A WRIT OF ERROR brought upon a judgment in the common pleas in debt for an escape. The defendant set out the plaintiff brought an action against a third person in the King's Bench: that the party was arrested thereon; and a writ of *habeas corpus* was granted by the court, and the plaintiff was removed from thence, and upon return of the writ before the court, the plaintiff was committed to the custody of the warden of the Fleet.

It was argued for the plaintiff, in error, that it ought to appear there was some action depending in the court of common pleas, to which this removal by *habeas corpus* was committed: to the contrary, for otherwise it was a void commitment; the defendant in the action was never legally in custody, and consequently this is not such an escape for which an action lies against the defendant. He cited 1. *Kell. Rep.* 217. *Carth.* 31. *Mod.* 10. *Lew. 1408.* *Wright*, 2. *Lew. 210.* *Lilly*, 157. *Carth.* 148. *Robinson*, 307.

The commitment is here to the defendant in his legal capacity, and it ought to be taken to be legal, and so it is the principle of the law.

The proposition is that the courts have acted according to law, and that it is not necessary to set aside the commitment. It is not necessary to set aside the commitment in this case, as it is a thing to the proceedings in the common pleas.

MICHAELMAS

MICHAELMAS TERM,

The Seventh of George the Second,

IN

The King's Bench.

Philip Lord Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq.*

} *Justices.*

*, Attorney General.

Charles Talbot, *Esq. Solicitor General.*

Memorandum.

Case 211.

THIS Term Sir PHILIP YORKE, *Knt.* was made Chief Lord Hardwicke Justice of the Court of King's Bench, and created a Peer promoted. by the title of BARON HARDWICKE, of *Hardwicke*, in the county of *Gloucester*.

The King against Taylor.

Case 212.

AN INFORMATION in the nature of a *quo warranto* was granted against the defendant in *Hilary Term* last, to shew by what authority he acted as capital burghs of the borough of *Evesham*; and in the information the usurpation was laid to be from the twentieth day of *August* last, to the filing of the information.

In an information *quo warranto*, if a usurpation be confessed by the defendant for only part of the time laid in the declaration, a general judgment of *ouster* is erroneous.

The defendant, by his plea, admitted a usurpation from the twentieth of *August* to the twenty-ninth of *September* last; and after having set out the constitution of the corporation he pleaded, that upon the twenty-ninth of *September* he was regularly elected into that office, and had ever since enjoyed the office under that election.

S. C. 2. Stra. 952. Show. 280. Cro. Jac.

S. C. 2. Kely. 272. S. C. 2. Bar. K. B. 238. 280. 316. 220, and the note. 260. 4. Med. 58. 1. Salk. 374.

T.

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To this there was a replication, and upon that four issues were taken:

THE FIRST ISSUE was, That the defendant at the time of his election was not a burges: and the charter requires the capital burgeses to be chosen out of the burgeses.

THE SECOND ISSUE was, That the meeting, at which this election was made, was not duly summoned.

THE THIRD ISSUE was, That the defendant was not duly elected.

THE FOURTH ISSUE was, That he was not duly sworn.

The first and last issues were found for the defendant, and special verdicts on the two others.

A general judgment of *ouster* was entered against the defendant; for as the defendant by his plea had confessed a usurpation, that was taken to be the proper judgment.

MR. WILLES moved to set aside this judgment; and insisted that if this general judgment of *ouster* should be permitted to stand, though the Court should be of opinion for the defendant upon the special verdicts, or indeed if all the issues upon the trial had been for him, he could not have had any benefit thereof, for there cannot be two inconsistent judgments entered; one, that the defendant shall be ousted; the other, and that he is acquitted of the usurpation. The office of capital burgeses in this case, which the defendant originally held by usurpation, was determined by a regular election on the twenty-ninth of September; and there could be no *ouster* of a thing not in being; and he cited the case of *The King v. Hicks* (a), which was an information of this sort; and the office there being determined at the time the party was convicted of the information, no judgment was entered; but only a *capiatur pro fine*. He compared it to the case of an ejection; where if the term was declared on expire before the judgment is reversed, there is no judgment entered for the recovery of the term, but for damages only; and it is for that reason application is usually made to the Court for enlarging the term.

CHAPPLE, Serjeant, on the other side. It appears by the defendant's confession that there has been a usurpation, therefore the crown is entitled to a judgment, and a general one only can be entered. The case of *The King v. Hicks* is not parallel; the person there not being in the possession of the office at the time of the conviction. These informations are in the nature of mixed actions, in which the possessor of the office is evicted; as well as a fine set upon him for the usurpation. I admit that where such an information is granted for claiming several franchises, the party may disclaim as to one and be ousted thereof; and acquit himself of any usurpation as to the other. But no instance of any such disclaimer being allowed for part of the time laid in the informations, can be given

(a) Hilary Term, 5. Geo. 1.

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where it is one office only. The defendant, being in possession of this office by usurpation, was incapable of being regularly elected into it. The statute 9. Ann. c. 20. l. 5. requires, that upon a conviction on this kind of information there should be a judgment of *ouster*, as well as a fine set on the party convicted.

Mr. HUSSEY cited the case of *The King v. Pindar* (a), where an information was granted against the defendant, to shew by what authority he claimed to act as mayor of the borough of *Penryn* in *Cornwall*; he justified by his plea, and set out that he was regularly elected into that office, and that he was duly sworn; upon both these matters issue was taken; and upon the trial it was found, that he was regularly elected, but that he had never been sworn; upon which a general judgment of *ouster* was entered against him: afterwards the party, supposing himself not disqualified by this judgment to execute his office for the future, provided he was duly sworn, applied for a *mandamus* to be sworn into it; to which this general judgment of *ouster* was returned; and upon argument, the Court held the return sufficient, for while this judgment subsisted he could have no benefit from any such *mandamus*; a writ of error was brought in THE HOUSE OF LORDS upon the judgment on the information, and likewise on the judgment of the Court upon the return to the *mandamus*, and the house of lords affirmed the judgment given below on the information, and quashed that on the *mandamus*, because no such writ lay.

Mr. PARKER on the same side. To shew, that in entering up judgments the usual terms must strictly be complied with, he cited *Walcot's Case* (b); and to shew that the judgment of *ouster* is an essential part of the judgment in an information, he mentioned LORD HOLT's opinion in the case of *The King v. Knollys* (c).

Mr. WILLES in reply said, the *Case of Pindar* is very different from the present; there the defendant justified his exercise of the office for the whole time the information charged him to have usurped; and it appearing that he never had been sworn, but during the whole time had illegally exercised it, no other judgment could be given but that of a general judgment of *ouster*. But here the justification not being an entire one for the whole time, but an admission of a usurpation until the twenty-ninth of September, and then a claim of it under a regular election, the party, indeed, is liable to be fined for having acted as a capital burgess until the twenty-ninth of September, but must be acquitted of any usurpation for the residue of the time. The notion, that an illegal exercise of office for a time will lay the party under a perpetual disability of being chosen in a regular manner, he said, was repugnant to common sense and reason, and not warranted by any legal resolution. He insisted, that the case in ejectment, before put, was in point; because, though the party was at the

(a) In the king's bench, 10. Geo. 2.
2 Ld. Ray. 1447.

(b) Salk. 632.

(c) Salk. 511. Skin. 514.

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time of trial in possession of the office, yet it was under a regular election; and the interest which the party had in the office, as an usurped one, and which he was liable to be ousted of by an information of this sort, was absolutely expired and determined by the election on the twenty-ninth of September.

MR. FAZAKERLY *on the same side*. By writs of *quo warranto* at common law, persons illegally in possession of offices which concern the public were liable to be ousted; but then they were not punishable by fine. This introduced informations of this nature, in which the person convicted is to be fined. But in these informations it not being a settled point, whether, upon a conviction thereon, the party was liable to be ousted, to satisfy this doubt the 9. Ann. c. 20. was made. The act of parliament only says, "that upon such convictions it shall and may be lawful for the Court to award a judgment of *ouster*, and likewise to set a fine;" and though the words, "it shall and may be lawful," should be construed compulsorily, and not to leave a discretion in the Court, as is contended for on the other side, yet the act must have a reasonable construction put upon it, and the provision for judgment of *ouster*, &c. must be intended only where there is a continuing illegal possession of the office, which is the common case, and not where the party is legally in possession thereof, though possibly he may have usurped originally.

6 Com. Dig.
"Quo War."
"ranto" (C. 5.)

MR. DRAPER, *on the same side*, as to the manner of pleading, cited, *Alton Wood's Case*, 2. Hen. 7. 11. 2. Roll. Abr. 124, 125.

THE COURT was clearly of opinion for the defendant, on the reasons before mentioned, and set aside the judgment.

Case 213.

The King against Carter.

The Court will not bail a man found guilty of manslaughter by the coroner's inquest, if it appear thereon to be murder.

S. C. 2. Kely.
28. 159.

MR. PARKER moved to admit the defendant to bail. The defendant was found guilty, on the coroner's inquest, of manslaughter, though by the evidence set out on the inquisition it appeared to be murder.

THE COURT held clearly they were not to be guided by the conclusion of the jury, but must judge themselves upon the facts set out; and though the party is found guilty of manslaughter only before the coroner, he may afterwards be convicted of murder upon the trial before the petty jury.

It was agreed likewise, that the defendant could not by affidavit enter into any proof of his innocence; though as to any corruption, or misbehaviour in the coroner or jury, he might.

And the motion was denied (a).

(a) See *Rex v. Aston*, 2. Stra. 851. *Cald.* 295. and 3. Hawk. P. C. 7th edit. ch. 15. § 80. *notis.*
Rex v. Dalton, 2. Stra. 911. *Rex v. Magarth*, 2. Stra. 1242. *Rex v. Homer*,

The

The Mayor of London against Sir Fisher Tench.

Case 214.

IN COVENANT the declaration recited an act of parliament, empowering the city of London to grant licences to any persons for twenty-one years, to furnish the city with convex lights for lighting the streets of the city; it then set out a grant thereof made by the city to Sir Samuel Garrard and Sir Fisher Tench for twenty-one years, reserving a rent of four hundred pounds a-year, payable by them, "their executors, administrators, and assigns;" and the breach assigned was, that Sir Fisher Tench, who was the survivor, had not paid the rent which was due at the Feast-day of St. John Baptist 1732.

In what case it is necessary to alledge an act done by a man or his assigns.

S. C. 2. Barn. 266.
5. Mod. 133.
Stra. 228.
Bull. N. P. 164.
2. H. Bl. Rep. 133.

The defendant craved *oyer* of the indenture, and then demurred; and assigned for cause, that the declaration does not say, that the defendant "or his assigns" have not paid, &c.

MR. BOOTLE, *junior*. The distinction is, that where an act is to be done by a man and his assigns, there it must be averred; that neither he nor his assigns have done it; but it is otherwise where an act is to be done to a man and his assigns; and he cited *Salk.* 139.

LORD HARDWICKE, *Chief Justice*. The distinction in *Salkeld* is a pretty nice one, and seems hard to be maintained. Why should the Court presume an assignment? It ought, I think, rather to come on the other side; but however this defect, if any, is certainly supplied by the words "*hucusque, &c.*"

MR. BOOTLE then took a second objection. It appears by the indenture, as set out upon *oyer*, that the act empowers the city of London to make grants for one and one-and-twenty years, which is for twenty-two years, and the grant mentioned in the declaration is for twenty-one years only, which is a variance, and not pursuant to the power given by the act.

Construction of the words of a deed.

MR. GERRARD *on the other side*. It is said in the declaration, that the plaintiff *hucusque habuit et gavisus est* the grant, &c. which excludes any possibility of assignment to any other person, and therefore it is sufficient to say the defendant has not paid.

LORD HARDWICKE, *Chief Justice*. If the city has a power to grant for twenty-two years, they certainly have a power to grant for twenty-one years, which is a less time, and so no variance at all.

THE COURT were all of the same opinion in both points.

LEE, *Justice*, cited 1. *Cro.* 235.

Judgment for the plaintiff (a).

(a) See *Gyse v. Ellis*, 1. *Stra.* 227. *Parsons' Case*, 1. *Keb.* 440. *Chalotier v. Davis*, 1. *Lutw.* 570.

Smith against Boucher and Others.

Case 215.

AN ACTION of assault and imprisonment was brought against the Judge of the vice-chancellor's court at Oxford, the defendants justify under process of the vice-chancellor's court at Oxford, founded on a custom; to which the plaintiff replies, that no affidavit of the cause of action was filed, as required by 12. *Cro.* 1. c. and judgment for the plaintiff.—S. C. 2. *Stra.* 993. S. C. B. R. H. 62. S. C. 2. *Bar.* 331. S. C. *Cum.* 89. 137.

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plaintiff in the action, the officer who arrested the now plaintiff, and the gaoler.

The defendants justified under a process issuing out of the said court of the vice-chancellor.

The justification set forth a custom in the university, established among others by act of parliament in *Queen Elizabeth's* reign, whereby the court is empowered, on complaint made by any person that he has cause of an action personal against another, and stating on oath the damage he has thereby received, and that he believes the person (against whom he has such cause of action) will get out of the jurisdiction, to issue a writ to take and commit such person to gaol, unless he finds bail, until the next court is holden: then the plea sets out, that one of the defendants had received a cause of personal action against the plaintiff, which he made complaint of, &c. and that the damage he thereby sustained was, in his estimation, to the amount of one thousand pounds; and that he suspected the plaintiff would make his escape out of the jurisdiction, and that he made oath *de et super præmissis*, and so justifies the commitment to gaol.

The plaintiff replied, that no affidavit of the cause of action was filed, as is required by the 12. Geo. 1. c. . before any *capias* can issue.

To this there was a demurrer.

CHAPPLE, *Serjeant, for the defendants.* The replication is bad, because the statute does not make the process void, but only inflicts a penalty on the officer, &c. for not complying with it: this appears from the penning of this and other acts of parliament, where the process is expressly declared void when that was the intention of the law; so it is in the 5. Geo. 2. an explanatory act of the 12. Geo. 1.; 7. Ann. 12.; 13. Car. 2. c. 2. s. 2. This is not unlike the case where an officer, after an arrest, refuses to take bail, which does not make the officer a trespasser. 3. Cro. 188. *Salmon v. Percival.*

HAWKINS, *Serjeant, on the other side.* The defendant's plea in this case is ill, and if so the plaintiff must have judgment, whatever becomes of the replication. There is in this case a mere nullity of jurisdiction, and the proceedings being void, all the defendants are trespassers, like the case of an appeal in the common pleas (a). This is a void custom; FIRST, Because it does not appear when the court is to be holden, at which the writ upon which the party is arrested is returnable (b). SECONDLY, Because no *capias* can issue without a previous summons (c). Supposing it then a void custom, it cannot be confirmed and made a good custom by the statute of *Elizabeth*, which in general terms only confirms the charters and customs of the university, and must have a reasonable construction (d). But, however, the defen-

(a) Moor, 275. Hale P. C. 35.

(d) Plowd. 399. Hob. 85, 86, 87.

(b) Dyer, 175. pl. 23. 1. Cro. 467.

Co. Lit. 38. Salk. 203.

(c) 1. Roll. Abr. 563. pl. 11. 1. Mod.

dants have not brought themselves within the custom; there is no pretence of jurisdiction in the court, unless there is a cause of a personal action; now it is said only, that the party complained he had such cause, &c. not saying that he really had. The nature of the injury also which the party received ought to be particularly set out, that it may appear to the Court whether a personal action would lie for it, and not to make himself the judge thereof. It is said the damage which the party received was in his estimation one thousand pounds, which ought to be alledged more positively; and it is said only, that the party made oath *de et super præmissis*, which is altogether loose and uncertain; and though this proceeding might not be looked upon as void with respect to the officer who executed the process, yet with respect to the parties to the action it will (a). And all the defendants in this case having pleaded jointly, if the plea is bad as to one, it is as to all.

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CHAPPLE, *Serjeant*. We have set forth our case according to the custom, and not in more general terms, and therefore this question will depend upon the validity of the custom: there are many customs in the city of London more extraordinary than this; which having the sanction of the Legislature have never been shaken: A custom for infants to bind themselves apprentices; a creditor may arrest for a debt not yet payable (b); houses may be bought and sold by parol and without enrolment, since the statute of Enrolments (c); debts by simple contract are equal to specialties; and many others of this nature (d).

LORD HARDWICKE, *Chief Justice*. I was at first a little doubtful whether this was a case within the 12. Geo. 1. c. . It is no unusual thing that affirmative laws should not controul particular customs, as in the case of courts leet, when an usage to hold them at different times than are prescribed by statute still prevails. But I find here are negative words in the act which will controul any particular customs inconsistent with the provision of the act. Supposing this to be a case within the act, then the question will be, Whether this non compliance with the direction of the 12. Geo. 1. will make the proceedings void? The Judge or the officer may be liable to an action for not pursuing the statute, where a person has received a particular injury thereby; or if it is a thing that is injurious to the public, it is an offence indictable; but still the proceedings in the action will not be affected by any such misbehaviour in the Judge or officer, and therefore the replication in this case is certainly ill.

As TO THE CUSTOM itself, we must be very tender in determining a question of such consequence to the courts of both the Universities. The cases which have been mentioned, of customs within the city of London, are very material. There does indeed seem to be some imperfections in that part of the defendants' justi-

(a) 2. Jones, 290.

(b) 2. Hen. 4. 12.

(c) Dyer. 229.

(d) 5. C6. 32. 3. C6. 116.

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fication; by which they would bring themselves within the custom, as particularly that the party took an oath *de et super præmissis*, the words implying no more than that the party took an oath relating to what is before mentioned. But then the nature of this action is considerable, and I cannot think any imperfection of that kind will make any of the parties to the proceedings trespassers. The case of *Gwyn v. Poole* (a) is strong to this purpose; where it seems settled, that although the cause of action arises out of the jurisdiction of the court in which the action is brought, yet neither the plaintiff, the Judge, nor the officer are trespassers, or liable to any action of this nature.

PAGE and PROBYN, *Justices*, were of the same opinion.

And PAGE, *Justice*, said, he doubted of what was said by HAWKINS, that if the plea is bad as to one, it will be bad as to all; and put this case: Suppose trespass and false imprisonment is brought against the plaintiff in a former action, and the officer and they join in a justification, under a judgment recovered against the now plaintiff; supposing in fact there is no judgment, the party to the action will fail in his justification, but not the officer, who has done no more than his duty in executing the process directed to him.

LEE, *Justice*. The replication is certainly ill, for the reasons that have been given; but it seems to me to be a considerable question, Whether if the custom, which seems to me to be a reasonable one, be not pursued, the defendants will not thereby become trespassers, as in the case of an appeal in the common pleas, before cited?

LORD HARDWICKE, *Chief Justice*. In the case of an appeal brought in the common pleas, there the Court has no jurisdiction; but here there is a jurisdiction, though it is not strictly pursued in all its circumstances.

The case was adjourned, and afterwards argued a second time.

SKINNER, *Serjeant, for the defendants*. The replication is clearly ill; for the omission in not filing the affidavit will not make the process void.

MR. STRANGE *for the plaintiff*. The plea is bad in this case. No summons appears before issuing the *capias*; the custom is bad, yet if good it is not pursued; it is, that the party is to make oath he has a personal action, but possibly no cause of action. This custom makes the person a judge what is a personal action, which is matter of law, and proper for the Court. It gives the plaintiff a power of settling the *quantum* the bail is to be taken for; which holds in cases of contracts only, not in trespass, or where the damage is uncertain; for there it is in the discretion of the Court,

(a) 2. Lutw. 935. 1560.

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and the *quantum* to be settled by a Judge. The apprehension or belief of the plaintiff that the defendant will withdraw himself, is not a sufficient foundation to deprive a man of his liberty; a writ of *ne exeat regnum* is not obtainable on such a suggestion. By this custom, the Court is at liberty to proceed either according to the law of the land, or the customs and statutes of the university; which custom is uncertain and bad, for some certain method of proceeding must be observed. The complaint may be made to one person, the oath administered by another; the complaint may be before the chancellor, his commissary, or deputy, but the oath before his commissary or deputy, which is a different person, and who does not appear to have any authority to administer it. However, the custom is not pursued. The custom is, that the party believes he will withdraw, &c.; and it is said only here, the plaintiff suspected, &c. Belief must be founded on some certainty, suspicion on slight circumstances. Here is no oath of one thousand pounds damage, but it is only said so much in his estimation, which is too loose, and not warranted by the custom. The oath is said to be made only "of or upon the truth of the premises:" though the premises be false, yet the party may safely swear "of or upon, &c." In the case of *The Queen v. Green (a)*, on a conviction for selling bread, &c. it was said, that oath was made *de veritate præmissorum*, and it was held ill. In *The Queen v. Gray*, Easter Term, 13. Anne, *præstitit sacramentum de veritate præmissorum materialium infra content.* held ill. The court, by the custom, is to be held every Friday, but this court appears to have been held the seventh of August 1731, which was upon a Saturday. This Court will take notice of the calendar. In the case of *Hoyle v. Lord Cornwallis*, which was, Error on a judgment in the common pleas; a writ of enquiry was laid to be executed on the fifteenth of June, which was on a Sunday; which was wrong by the statute of *Charles the Second*, it appearing to be so by looking into the calendar; judgment was reversed. By the custom, the court is to be holden within the precincts of the university; but this court does not appear to have been so holden. All the defendants having joined in pleading, if the plea is bad as to one, it will be so as to all. Though the oath does not appear to the bailiff or gaoler, yet they are not excusable in this action, unless they had severed in their plea. In the case of *Gwynn v. Poole*, the reason the Court went upon there was, the presumed ignorance of the place where the cause of action arose. There can be no such pretence here; they cannot be unacquainted with their own customs. In 1. Vent. 220. it is said, that there can be no justification under the process of an inferior jurisdiction, unless it can be shewn to be regular.

PER CURIAM. That case is not law. In the case of *Phillips v. Byron (b)*, Trespass was brought against two defendants, who justified under a judgment which was afterwards set aside for ir-

(a) Hilary Term, 10. Anne.

(b) Hilary Term, 8. Geo. 1.

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regularity, and held no good plea as to *the plaintiff*, though it would be as to *the officer*; but he having joined in pleading, it is bad as to both. 1. *Saund.* 28.

SKINNER, *Serjeant, à contra*. This is a court founded on immemorial usage, letters patents, and acts of parliament. The defendant comes before the chancellor, and swears, that he has an action of damage and injury which he computes at one thousand pounds, which is only more modest than the common method. The plaintiff's apprehension of the defendant's withdrawing himself is good within the custom. The chancellor's election of proceeding by our law or the custom and statutes of the university is well warranted by the letters patents, confirmed by act of parliament. The making oath before the chancellor, his commissary, or deputy, that must be understood deputy of the chancellor, not of the commissary. This custom thus established is good (*a*). The words *of and upon the truth of the premises in manner aforesaid*, refer to what went before, and is the same thing as if repeated. The party, by the custom, is not obliged to shew the reason of his belief; suspicion is a degree of belief. It is objected, that no positive oath is made of one thousand pounds, &c.; though it had been positive, it must have been according to his estimation. I admit the warrant was not on a court day, nor is there any necessity for it within the custom. As to the objection, that it is not said *within the precincts*, &c.; I answer, that it is said *according to the custom*, which necessarily implies it. An action lies not against a Judge, though against him, not against his officer.

2. *Lutw.* 1560.
1. *Levinz*, 95.

LORD HARDWICKE, *Chief Justice*. There are two general points. FIRST, As to the custom. The privileges of the university are to be supported as far as the law of the land will permit. The judgment here will not affect this custom of the university. "Personal action" and "cause of action" is the same thing. The definition of action in the civil law is the right of suing, or *jus prosequendi*. As to the objection, that the party is to swear positively, the party is to swear according to his apprehension, and that is the foundation of the process. It is said, it puts it in the power of the plaintiff to settle the *quantum* of the bail: that is still subject to the power of the Judge, and the oath is in case of the defendant. It is objected also, that the custom giving the alternative of proceeding either by the common law or by the custom and statutes of the university, there is not only a charter for it, but it is confirmed by act of parliament; the charter singly would not make it good, for the crown cannot erect a new court contrary to the laws of the land. It is also objected, that different persons are to award the warrant and administer the oath: the commissary might have a deputy. We take notice of the proceedings of the civil law; and a commissary may make a surrogate, who is in the nature of a deputy.

The difficulty is on THE SECOND POINT, Whether the defendants have brought themselves within the custom? Suspecting is

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not believing; saying he suspects would not be well; but swearing according to his estimation is sufficient. Saying only, "of and upon the premises," is a very strong objection, and is always fatal upon a conviction, where the party must swear the particulars. The words *in manner aforesaid* do not seem to refer to the custom; but it is said before, that the defendant offered to take oath "of and upon the truth of the premises according to his belief:" but it does not appear what that was; whether the fact was true or false. There is nothing in the objection of not issuing the process in court or any day certain. The only objections which seem material are, saying only that the party suspected, and *de et super veritat. præmissorum*. The question then will be, If this is a good justification as to any of the defendants, though the custom be not pursued? If the beadles and gaoler had severed in pleading, they had been excused. It can hardly be maintained under the authority of *Gwynn v. Poole*, that the Judge and plaintiff are not liable to an action, as they must be presumed constant of the custom. POWELL, *Justice*, there says, he doubted whether an action would not lie for suing in an inferior court, where the cause of action arose out of the jurisdiction.

PAGE, *Justice*. It does not appear that the commitment was to a prison within their jurisdiction; it is to the county gaol; and it is not reasonable that the party should be committed to any other place. If the case is not brought within the custom, it is the same thing as if there were no custom at all. I agree to the difference in respect of an action lying or not between the party and officer. If the plea is bad as to one, it must be so as to all.

PROBYN, *Justice*. The custom is not well pursued. But as to the objection respecting the commitment, here is an averment of the plaintiff's commitment to the place where they used to commit; and that is sufficient.

LEE, *Justice*. All the defendants are in the same condition, as they have joined in pleading. The principal point is, Whether an action will lie against the Judge and the party? They cannot be supposed to be ignorant of the custom; and therefore this will not clash with the doctrines in the case of *Gwynn v. Poole*. What has been done is void, and so the parties are trespassers. *Hob. 63.*

This case was adjourned for another argument on that last point only.

MR. DENNISON *for the defendant*. As to the objection to the word "suspect," that is supplied by the words of the plea following, "nor would the said *A. B.* (meaning the defendant in the action below), legally appear, if he was cited, according to his belief, but rather run away." Mich. 3. Geo 2.

LORD HARDWICKE, *Chief Justice*. That is not an independent member of the sentence; but the word "suspect" must, in construction, run through the whole sentence.

MR. DENNISON. The question then is, Whether, though the affidavit is not made pursuant to the custom, this action will lie against the defendants? It appears, that the place, the person, and the

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the cause of action were within the jurisdiction; therefore the issuing this warrant without a proper oath is not a void proceeding, but an erroneous one only (a). The process, indeed, must be warranted according to the course of the court, as in *Hob. 63.* where it is held, that it is trespass to take a person on a verbal command from a Judge, where the custom is to issue a precept in writing. In that case, there was no jurisdiction as to any such process; but here there was no defect of jurisdiction as to the warrant, but only an irregularity in awarding it without a previous oath. In *Roycroft v. Colecroft* (b), Trespass and false imprisonment against the deputy-recorder of *Grantham*; justification under the process of the court; reply, that no affidavit of the cause of action, according to the late act, was filed previous to the issuing the writ; on demurrer thereto held, that the action would not lie. A special action on the case is a proper remedy; here the officer is possibly not liable, if he had pleaded separately; but with regard to the Judge and the plaintiff in the action below, it is clearly otherwise. In the case of an execution, the officer may justify under the writ, the party must set out the judgment (c). In *Phillips v. Byron* (d), Trespass against the plaintiff in the action and the officer, for an execution on a judgment set aside before that time; it was held clearly, that the action lay against the party, and the officer having joined in the same plea could not discharge himself. Trespass lies in all cases where the act done is in itself injurious; actions on the case only where it is injurious in its consequences. The case in *Hob. 63.* is in point.

THE COURT was unanimous, that the principal case was not distinguishable from *Hob. 63.*

Judgment for the plaintiff.

LORD HARDWICKE said, that the defendants having all joined in one plea, it was sufficient if one of them was liable to the action, as the plaintiff below clearly was; and though it was not necessary to determine whether the Judge was liable to it, yet, he said, he was of opinion, that he was, who cannot but be presumed constant of his own method of proceeding.

Judgment for the plaintiff.

(a) 10. Co. 76. 1. Vent. 263.

(b) In the court of common pleas, 1728.

(c) 2. Lutw. 1568. Salk. 408.

(d) Hilary Term. 3. Geo. 1. 1. Stra.

509.—See also *Parsons v. Lloyd*, 1. Black. 845. *Perkins v. Proctor*, 2. Will. 384.

Case 216.

Thomas against Bishop.

If a bill of exchange be drawn on the clerk of a public company,

and he accepts it in his own name, without saying "for the Company," he is personally liable; for the fact of its having been drawn and accepted on account of the Company cannot be explained by any extrinsic circumstances, as the letter of advice, &c.—S. C. 2. Stra. 956. S. C. 2. Bar. K. B. 320. 314. S. C. 2. Kely. 136. S. C. B. R. H. 1. Kyd on Bills, 86.

UPON A MOTION for a new trial for a misdirection by PAGE, Justice (who tried the cause in London), to the jury. The case appeared to be: One *Mildmay*, a servant to the *York Build-*

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ings Company in Scotland, drew a bill of exchange for two hundred pounds payable to Somerville or order, and the direction of it is, "To John Bishop, cashier of the York Buildings Company, in Winchester Street, London;" and the conclusion of the bill was, "Place the same to the account of the York Buildings Company." At the same time, a letter was directed to the Company advertising them of this draft upon the defendant Bishop. Somerville indorsed the note to the plaintiff, who applied to the defendant; who accepted it generally in his own name, not taking any notice of the Company.

Upon the trial, PAGE, Justice, was of opinion that the defendant was chargeable with the payment of the money, and directed the jury accordingly, who found for the plaintiff.

MR. STRANGE moved for a new trial, and insisted, that there were many circumstances in the case which would make it appear highly probable that the defendant accepted this bill of exchange, not *jure proprio*, but as a servant to the Company. As, first, the direction of the bill to him with that addition, viz. "cashier, &c.;" the letter of advice from Mildmay to the Company relating to this bill; and the conclusion of the bill, viz. "place it to the account of the York Buildings Company," and not to the account of the drawer, as in the other case: that these were such circumstances in favour of the defendant, that it ought at least to have been submitted to the jury as a matter of fact, whether the defendant accepted this bill in one capacity or the other.

DARNELL, Serjeant. In what right the defendant accepted this bill is not to be referred to a jury. By this acceptance of it in his own name, and not as a servant to the Company, he is become chargeable with the payment of it. Any person may accept a bill, though not drawn on him, and so make himself liable.

STRANGE. I agree a stranger may accept, but then it must be for the honour of the drawer, and so expressed in the acceptance, in order to charge the drawer afterwards.

LORD HARDWICKE, Chief Justice. Bills of exchange are contracts of a particular nature, and they must appear in writing, and no extrinsic evidence ought to be admitted. The drawee of a bill can no otherwise accept than *secundum tenorem billæ*. There are, indeed, some cases where the form of a bill of exchange is in some measure pursued; as by directing money to be paid to A. or order out of a peculiar stock; but then it being directed to be paid out of a particular fund, they are not bills of exchange, but operate only as appointments to pay money (a). What is added to Bishop's name is not material, being descriptive only; and the letter of advice is a private transaction between the drawer and drawee, and which

(a) See Jocelyne v. Lafferre, 2. Ld. Herle, 8. Mod. 265. 2. Ld. Ray. 1361. Ray. 1362. Fort. 281. and Jentry v. 1. Stra. 591.

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no other person can have any knowledge of. If any evidence to destroy the bill itself should be allowed, it would be very dangerous for any one to take an indorsement, and would prevent the circulation of such bills in a great measure.

The rest of the Judges concurred, and the motion was denied (a).

(a) See *Dawkes v. Deloaine*, 3. Will. bury v. Liffert, 2. Stra. 1211. *Haydock*
207. S. C. 1. Black. Rep. 782. Ban- v. Lynch, 2. Ld Ray. 1563.

Case 217.

Brassey against Dawson.

The collector of the land-tax is a debtor to the king for the money in his hand; and therefore if he become bankrupt, and the commissioners of the land-tax distrain, the goods taken on distress cannot be recovered in trover by his assignees under the bankruptcy without tendering the sum due to the king, although the warrant of distress issued subsequent to the act of bankruptcy, and the goods were not sold under it until after the assignment.

S. C. 2. Stra.
978.

S. C. Cunn. 65.

S. C. 2. Bar.

K. B. 342. 382.

2. Show. 480.

UPON A TRIAL before LORD RAYMOND, the point reserved was this: The collector having received the land-tax committed an act of bankruptcy; the commissioners of the land-tax issued out a warrant of distress against him for such money, after the time of an act of bankruptcy committed by him, and before the issuing of the commission.

And the question was, Whether an assignment of the bankrupt's effects will, by relation, vest a property in the assignees from the time of the act of bankruptcy committed, and so overreach the intermediate distress (a)?

SERGEANT DARNELL for the plaintiffs, who were the assignees, cited the case of *Andrews v. Sir Matthew Decker* (b), tried before EYRE, Chief Justice, Easter Term, in the third year of George the Second. The action there was brought against the defendant, as sheriff, for a false return of *nulla bona* to a *fieri facias*; and the defendant in that case proving the person against whom the *fieri facias* issued had committed an act of bankruptcy, THE CHIEF JUSTICE held, *nulla bona* was a proper return, the party after the bankruptcy not having any property in the goods.

EYRE, Serjeant, on the other side. This must be considered as a debt due to the crown, and the prerogative will prevail against common persons (c). No property vests in the assignees until assignment; for the bankrupt's interest in his goods continues after the bankruptcy committed, and they are liable to be taken in execution for his debts.

DARNELL, Serjeant. I agree that no property vested in the assignees until the assignment; but still it is divested out of the bankrupt. It is like the case of administrators, who, by relation, have a property in their intestate's goods from the time of his death, and in the mean time they are in the custody of the law.

(a) The act of bankruptcy was committed on the 7th of July 1731; the commissioners of the land-tax issued the warrant of distress, and the goods were seized thereon on the 16th of July; the commission of bankruptcy issued the 17th of July; the bankrupt's estate was as-

signed to the assignees on the 19th of July; and on the 22d of July the defendant took away the goods, and sold them under the warrant of distress. S. C. 2. Stra. 978.

(b) Cunn. Rep. 65.

(c) 3. Keb. 14. 1. Jones, 203.

LORD

LORD HARDWICKE, *Chief Justice*. There are two points: FIRST, Considering this as the case of a private person; and, SECONDLY, as the case of the crown.

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As to THE FIRST, Though the property is not actually divested out of the bankrupt until assignment, yet when that is done, it relates to the time of the bankruptcy committed, so as to avoid all intermediate acts done by the bankrupts themselves, but not with respect to strangers, when the execution, &c. at the suit of any other person is completely executed; though where the goods are in the sheriff's hands, and the execution is not completed, it may be otherwise: as the present case is, the goods are in the hands of the constable, and therefore the assignment in this case may prevail against the distress.

But considering this as an execution at the suit of the crown, it seems otherwise; and this is a prerogative case, for it is a debt owing to the crown for the use of the public. Suppose the act had granted this money to the crown without giving any particular remedy for the recovery of it, *an extent* from the exchequer might certainly have issued; and the giving a summary remedy for the recovery of it cannot alter the nature of the debt. In the case of *an extent*, the goods are bound from the *teste*. The king not being within the statute of Frauds, &c. the relation of a property in the assignees to the time of the bankruptcy committed cannot prevail in this case, because the king cannot now come in as a creditor, and so a wrong would be done by relation, which is always to be avoided.

LEE, *Justice*, cited HOLT's opinion, *Salk.* 111.

This case was now adjourned, and argued again in *Hilary Term*, in the seventh year of *George the Second*, as follows.

MR. STRANGE *for the plaintiff*. The collector of the land-tax, on the seventh of *July* 1731, became a bankrupt; on the sixteenth, the commissioners of the land-tax issue their warrant to levy the public money he had in his hands, according to the direction of the land-tax acts in such cases; and the same day the bankrupt's goods are seized upon such warrant. A commission of bankruptcy is taken out on the seventeenth; the assignment made the twenty-first; the goods taken away on the twenty-second; and sold on the sixth of *August*.

I shall consider this case in two different views:

FIRST, Supposing it to be between private persons; SECONDLY, as it is in the case of the crown. It appears by the 3. *Geo.* 2. c. 25. being the Land Tax Act for the year when this matter happened, that the goods of the collector so to be seized by the warrant of the commissioners must be, not what he has in his custody, but what he has a property in at that time. The property was divested out of the bankrupt in this case on the seventh of *July*, the day the bankruptcy was committed, with respect to all persons
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except the crown, and then not until the assignment made. This appears likewise by the words of the 1. Jac. 1. c. . "That the goods of the bankrupt shall be distributed whereof no execution is served and executed before the act of bankruptcy committed." This seems clearly to be admitted to be law in 3. Lev. 69. 191. In the case of *Hussey v. Fiddel* (a) it was held, that the assignees, &c. might either bring trover for goods sold by persons after an act of bankruptcy committed, and before commission, or might bring an action for the money, allowing the sale good. If the bankrupt had any property, in such case the sale to an honest purchaser might at all events be good, which by that authority appears to be otherwise; for the assignees may either disallow the sale, or consider the bankrupt as their servant, and so bring an action for the money for the goods sold by him acting in that capacity under them. It is sufficient, however, for us if the property be *in abeyance*, like the goods of an intestate when there is a contested administration; for if they are not in the bankrupt, they are not subject to this execution within the act.

As to THE SECOND POINT, Whether this warrant be equivalent to an extent for the king's debt, it will be against us, it being before assignment. But the collector here is not to be considered as a debtor of the crown; it is the receiver only which is answerable to the crown. The receiver-general is appointed by the crown, the collector by the division; and no payment to the collector is a discharge of the division, by the express words of the act; which is a very strong proof that he is not looked upon as a servant of the crown. And there is no danger in this case that the crown can suffer, there being a provision in the act for reassessments on the division in such cases. Supposing the crown has a power of proceeding against the collector in this case as its servant, yet this remedy by warrant is not equivalent or entitled to the same privileges as an extent. An extent is a common-law process, a matter of record, and, in the case of the crown, binds from *the teste*, the king not being within the statute of Frauds, &c. The warrant here is a matter *in pais*; and can it be imagined, if the act had intended the crown should have a remedy in this case against the collector, as their servant, the method of proceeding by extent would not have been mentioned, or at least, in giving this remedy by warrant, declared, that it should be equally advantageous to the crown? This method, therefore, seems to be designed merely for the advantage of the division, who were liable to make good any such deficiency, that they might get what they could from the collector in this summary way, and not that every inhabitant should be under a necessity of bringing an action to recover their several sums so paid to the collector.

THE COURT conceiving this to be a case of importance, took time to consider it until *Trinity Term*, in the seventh and eighth years of *George the Second*; when

(a) 12. Will. 3. 12. Mod. 324. Holt, 95. 3. Salk. 59.

LORD HARDWICKE, *Chief Justice*, gave the resolution of the Court to this purpose.

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The general question is, Whether, by the assignment, the property in the bankrupt's goods passed to the assignees at the time of the bankruptcy committed? And we are all of opinion it did not. Two points have been made in the argument of this case.

FIRST, Supposing this to be an execution at the suit of a private person, the assignees would have been entitled. This depends on the construction which the statutes of 13. *Eliz.* c. 7. and 21. *Jac.* 1. c. 19. have received. The construction has been, that no interest in the bankrupt's effects is vested in the commissioners, but a power only of making an assignment, 2. *Jones*, 196.; and that where the commissioners have once executed that authority, the property is, by relation, vested in the assignees from the time of the bankruptcy committed. It was ruled by HOLT, *Chief Justice*, in the case of *Cole v. Davies* (a), that where execution is executed, and afterwards the defendant becomes a bankrupt, that the subsequent bankruptcy will not affect the execution; otherwise if it were executed after the bankruptcy committed. The delivery of the writ to the sheriff, without an actual execution thereon, before the act of bankruptcy, is no bar against the assignees (b). This is better explained by HOLT, *Chief Justice*, in the case of *Kiggil v. Player* (c). But yet, until the assignment is made, the property is not in the commissioners, nor is it in abeyance, but it is in the bankrupt himself.

THE SECOND POINT is most material in this case. AND FIRST, It is to be considered, whether the bankrupt, in respect of the sum which he had collected and had in his hands, was a debtor to the crown. SECONDLY, What was the effect of the seizure under the warrant of the commissioners.

AS TO THE FIRST several objections are made. FIRST, That the collector is not an officer of the crown; that the receiver is the only debtor to the king. It is said likewise, that the division is the debtor, and the collector a debtor to them only. This question depends on the Land Tax Act of 3. *Geo.* 2. By that act, the duty is granted to the king, and the subsequent clauses relate only to the manner of its collection. The collector appointed by the commissioners is paid his salary out of the money collected, on payment to the receiver; who is expressly discharged against the king, &c.; and the division is only in the nature of a surety for the collector.

SECONDLY, As to what is the effect of the seizure under the warrant of the commissioners, it must be agreed, if this had been *au extent*, it would prevail against the assignees. But this warrant, it is said, is a mere act *in pais*, and not to be compared to an extent. To be sure, it is not of equal force, so as to bind from

(a) Hilary Term, 10. *Will.* 3. 1. *Ld.*
Ray. 724.

(b) 3. *Lev.* 69. 191.

(c) 1. *Salk.* 111.

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the date, &c. but it is plainly designed by that act in imitation of that remedy. The point we go upon is, that before the assignment here was an actual seizure for a debt incurred to the crown before the bankruptcy, and thereby such a lien on the bankrupt's goods as could not be defeated by the subsequent assignment; and that for three reasons: THE FIRST, Because these goods were properly seizable, being the goods of the bankrupt at that time, as appears by *Salk.* 108. 111. THE SECOND, The king is not bound by the statutes concerning bankrupts, not being mentioned there in (a). It is certain, that in the case of the king the extent binds from the date, which would not be so if the king was included in those acts, as appears by 3. *Lev.* 191. The word "extent" in those acts relates only to private persons; and this is farther illustrated by the clause in 21. *Jac.* 1. c. 19. s. 10. relating to *extents in aid*. Extents in case of the crown before assignment are good (b). But it may be said, why should the king be any more bound by the assignment than the bankruptcy? Because by the assignment there is a property actually invested in others, which cannot be divested even in the case of the crown. THE THIRD REASON is, that the king is never affected by relation (c). This relation here is founded upon the construction of the statutes relating to bankruptcy, in which the king is not included. But it is said, if this should prevail, the king, by a debt contracted since the bankruptcy, may defeat the creditors of all their just debts. But in answer to this, in the first place, fraud is not to be presumed in the crown; secondly, this would be the act of the bankrupt himself after the bankruptcy committed, and he then can do no act injurious to his creditors. *Salk.* 108. Creditors are not hurt by the bankrupt's outlawry.

ANOTHER OBJECTION was, that no sale was made of the goods, in pursuance of the seizure, until after the assignment. As to that, from the time of the seizure the goods were *in custodia legis*, and not liable to any other demand until the money for which they were so seized was paid. But it has been held (d), that goods extended before any act of bankruptcy committed, and *no liberate* sued out until after, yet were not assignable by the commissioners; which comes up to the present case, the act of bankruptcy being the same thing among private persons who are creditors as the assignment in case of the crown.

Judgment for the defendant (e).

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| (a) 1. Jones, 202. | sey, W. Jones, 262. <i>Rex v. Pixley</i> ; |
| (b) 2. Show. 481. | <i>Bonb.</i> 202. <i>Upham v. Sumner</i> , 2. <i>Black</i> . |
| (c) <i>Hob.</i> 339. | <i>Rep.</i> 1294. <i>Lechmere v. Thorogood</i> ; |
| (d) <i>Cro. Car.</i> 148. 1. Jones, 202. | 1. <i>Show.</i> 12. 3. <i>Mod.</i> 236. <i>Rorke v.</i> |
| (e) See the Attorney-General v. | <i>Dangrell</i> , 4. <i>Term Rep.</i> 408. |
| <i>Capell</i> , 2. <i>Show.</i> 480. <i>Audley v. Hal-</i> | |

Kent against Kent.

Case 218.

WRIT OF ERROR of a judgment in dower given in the common pleas in *Ireland*, and affirmed in the king's bench there.

Exceptions on a writ of error to a judgment in dower.

MR. STRANGE for the plaintiff in error took five exceptions.

FIRST, That the value of the dower and damages was given to the time of the judgment; and it appears upon the record, that the action was not brought until two years after her husband's death, in which cases damages are not recoverable (a).

S. C. B. R. H. 50.
S. C. 2. Barn. 357. 386. 441.
S. C. 2. Stra. 971.
S. C. Cun. 44.

SECONDLY, Sixpence damages and sixpence costs are given in the common pleas, and yet no judgment taken for either of them, nor any remitter of them on record.

THIRDLY, Upon the affirmance of the judgment in the king's bench in *Ireland*, three hundred pounds damages and costs are given, according to 3. Hen. 7. c. 10. but not said *occasione dilationis executionis*, &c.

FOURTHLY, It appears by the record, that the writ of error in the king's bench in *Ireland* was first brought by two persons who were defendants in the common pleas there; that one of them died, and afterwards a writ of error *coram vobis* was brought by the survivor and the heir of the person so dying; and in the entry of the judgment in the king's bench, all the costs and damages are awarded against the survivor, whereas it ought to be against both.

FIFTHLY, The plaintiffs in the writ of error are amerced.

MR. PARKER, in answer to these several exceptions, said,

As to THE FIRST EXCEPTION, If the plaintiff in the writ of error would have any advantage of the time when this writ of dower was brought, the original writ ought to have been brought before the Court by *certiorari*, and no regard is to be had as to the time, as it appears by the recital under the memorandum, &c. Besides, it appears in *Co. Lit.* 32. that if the defendant in a writ of dower would make advantage of the laches of the widow to bar her of her damages, he ought to insist upon it in pleading by shewing he was always ready, &c.

As to THE SECOND EXCEPTION, The sixpence damages and sixpence costs are included in the sum mentioned in the words *que in toto attingunt*, &c. upon the affirmance in the king's bench; but, however, this is a miscomputation only, which will not be error. 1. Jones, 171. Palm. 510.

As to THE THIRD EXCEPTION, No courts of justice are obliged to give the reason of their judgment, and therefore the

(a) Co. 32.

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words "*occasione, &c.*" not necessary; but, however, if that were so, yet this error in entering the damages and costs will not affect the printed judgment in dower. *Sty.* 290. *7. Mod.* 154.

As to THE FOURTH EXCEPTION, The heir of the person dying is joined for conformity, and the damages survived against the other.

As to THE FIFTH EXCEPTION, An amercement is a punishment by the Court for prosecuting without cause, which appears by the affirmance of the judgment to be the case here, and therefore very proper (a). However, this is cured by 16. & 17. *Car.* 2.

LORD HARDWICKE, *Chief Justice*. Both the answers given to THE FIRST EXCEPTION are good.

As to THE SECOND EXCEPTION, It appears by computation, that the sixpence damages and sixpence costs are included, &c. However, that is such a mistake as may be set right at any time.

As to THE THIRD EXCEPTION, Though the precedents are *occasione dilationis executionis*, yet the general rule is, that no Court is obliged to give the reason of their judgment. So it is in the case of justices, &c. But it appears here likewise, that the defendant in error has been delayed of her execution by the writ of error; which the Court will take notice of.

As to THE FOURTH EXCEPTION, The judgment for the damages and costs being grounded on the statute, and the principal judgment on the common law, it is reversible *quoad* that part only. But I do not see how this can be assigned for error. The person against whom no damages are awarded cannot, because it is for his benefit; and here both of them have joined in the writ of error.

As to THE FIFTH EXCEPTION, I never saw a *misericordia* upon a writ of error. But this is aided by the 16. & 17. *Car.* 2.

At another day, LORD HARDWICKE, *Chief Justice*, said he had looked into THE BOOKS, and found many precedents and cases where things for the benefit of the party may be assigned for error; and cited 1. *Roll. Abr.* 759. *Yelv.* 107. 8. *Co. Boucher's Case*; and therefore desired that point only might be spoke to again.

LEE, *Justice*, cited 4. *Leonard*, 6. to the same purpose.

In Hilary Term, in the seventh year of George the Second, this single point was argued, *viz.* Whether the judgment was right in awarding the damages against the surviving plaintiff in error only?

LORD HARDWICKE, *Chief Justice*, gave the resolution of the Court. There are three questions;

(a) 2. *Saund.* 226. *Salk.* 253.

FIRST, Whether the king's bench in Ireland ought to have given any judgment for the damages incurred since the first judgment obtained in the common pleas there ?

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SECONDLY, Whether they are regular in giving judgment for damages against the survivor only ?

THIRDLY, Whether that can be now assigned for error by both, as it is for the advantage of the person not charged with damages ?

As to THE FIRST, The Court ought to give judgment for the damages incurred since the first judgment ; but that power is not given by the statute of *Merton*, the provision there being only for the damages *à morte viri* to the time of the first judgment. The inconvenience widows were under in being kept out of their dower a long time, gave occasion to that provision made in their favour by the 16. & 17. *Car.* 2. c. 8. s. 4. which directs a writ of enquiry to issue for the recovery of damages subsequent to the first judgment. This act was made an *Irish* law, by 17. & 18. *Car.* 2.

As to THE SECOND POINT, By this act, the other plaintiff in error is clearly liable to those damages as much as the survivor.

But there is a stronger objection to this judgment, which has not been mentioned at the Bar. It appears, that no writ of enquiry was awarded in this case, which ought to be, the statute requiring such judgment to be given for those damages upon the return of the writ of enquiry. It may be objected, that the value of the lands recovered in dower, which is the measure of damages, is ascertained by the verdict ; and as it lies in computation only, the Court might do it without any inquest at all, as it is on the statute of *Merton*, when the value of the lands recovered appears by the verdict, the Court gives judgment for the damages. But the statute of *Merton* directs not any writ of enquiry to issue, and the manner of giving them is discretionary in the Court. *Rastal*, 230. 2. *Saund.* 335. 1. *Lutw.* 719. 1. *Lev.* 921. The case, indeed, in 2. *Saund.* 335. seems to contradict this opinion ; but it does not appear by the case that this point ever came in question. Besides, the damages there are not given *pro valore dotis*, but *pro dilatione executionis*, on the statute of 3. *Hen.* 7. c. 10.

As to THE THIRD POINT, Both may properly join in this writ of error. It is true, in general, the rule is, that the party cannot assign for error anything beneficial to him ; summons and severance is the common practice in such cases (a). But that rule must be construed with this restriction, that the party shall not assign for error any mistake in process, delay, &c. which is in his favour ; otherwise it is where the fault lies in the judgment given by the Court (b).

(a) 1. *Cro.* 891. 1. *And.* 239.

(b) 8. *Co.* 59. 2. *Saund.* 45. *Yelv.* 197. 1. *Roll. Abr.* 759.

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There can be no doubt but that this judgment may be partly affirmed and partly reversed (*a*), as part of it is grounded on common law, and part on statute (*b*).

THE QUESTION then will be, What judgment we are to give? The general rule is, that upon the reversal of a judgment here, this Court is to give such a judgment as the Court below ought to have given (*c*). But in this case we can give no judgment for these damages, but must remit the record to the king's bench in *Ireland*, requiring them to award a writ of enquiry to the Sheriff of *Kilkenny*, where the lands lie, and upon the return of that writ the Court there are to give judgment for the damages (*d*).

This case is not unlike proceedings in THE EXCHEQUER-CHAMBER, where they remit the record to this court to award execution (*e*).

Judgment therefore must be affirmed as to the recovery of dower, and the award of seisin thereon, and reversed as to the damages; and a mandate to issue to the court of king's bench in *Ireland* to award such writ of enquiry.

- (*a*) See *Green v. Waller*, 2. Ld. Ray. 891. *Knox v. Costello*, 3. Burr. 1791. *Heath v. Chilton*, 4. Burr. 2015. *Hancock v. Haywood*, 3. Term Rep. 435. (*b*) 1. Salk. 24. (*c*) Cro. Car. 442. (*d*) Cro. Jac. 534. Cro. Car. 511, 512. (*e*) Cro. Jac. 206. Carth. 180.

Case 219.

Gilmore against Horton.

The damages laid in the declaration are to be considered as the cause of action, and not those found by the verdict.

See Tidd's Practice, 28. 121. 124. 179.

THIS and many other cases of the same nature having been long depending for the judgment of the Court, where the damages laid in the declaration were more than ten pounds, and less found by verdict;

LORD HARDWICKE, *Chief Justice*, now delivered the opinion of the Court in this manner: The principal argument that has been made use of in support of such proceedings is the hardship the suitor would be under if, in actions which lie in damages, the money found by the verdict to be due to the plaintiff should be construed to be the cause of action. And on the other side it is insisted, that if the damages laid in the declaration are to be taken to be the cause of action, the act will easily be evaded and rendered ineffectual. WE ARE OF OPINION the damages laid in the declaration are the cause of action. If this matter rested merely on the 5. Geo. 2. c. 27. it might be a very considerable question, and some inconvenience might have attended a determination either way: though it seems, as it stands upon that act only, this would be the most proper construction. The words "cause of action," in the 12. Geo. 1. c. 29. must mean the charge laid in the declaration; and that act being recited by the 5. Geo. 2. c. 27. is material in this case. In the clause of the 5. Geo. 2. c. 27. relating to special writs, the words "cause of

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HORTON.

"of action" must have this construction, or otherwise attornies, &c. would be liable to penalties which it is not in their power to avoid. In pleading the statute of Limitations to an executory contract, it is said *causa actionis non accrevit, &c.* which must refer to the demand laid in the declaration. The statute of *Gloucester* has restrained the superior courts from proceeding in actions under forty shillings (a). LORD COKE says (b), that clause has received this construction, that it must appear by the count that the action is for less than forty shillings, and not by the verdict to bring the case under the restriction of that clause. In *Bro. Abr.* (c) it appears, that if in an action brought in a court baron or other inferior court, which cannot hold plea of actions above forty shillings, though above forty shillings is recovered, the plaintiff may remit what is more than forty shillings, and take judgment for the residue; which proves that the damages found by the verdict are not the rule to go by; for if so, it would appear by the verdict that the cause of action was such of which the inferior court had no jurisdiction. But whatever doubt there might be on the 5. Geo. 2. c. 27. relating to the proceedings in *Wales*, that act was plainly intended to extend the same provisions to *Wales*; and in that act the words are, "debt or damages declared on," which, from the nature of the thing, must be intended to mean what in the other act is called "cause of action;" and this, therefore, is a parliamentary exposition of what they mean by the expression "cause of action."

(a) 2. Inst. 310.—See also 3. Burr. 1592. Sayer Rep. 219. 240. 4. Term Rep. 495.

(b) 2. Inst. 312.

(c) Bro. Abr. "Jurisdiction," pl. 40.

Moy against Osborne.

Case 220.

DECLARATION in *English*. The damages were laid at s. c. 2. Barn. twenty-five pounds; the verdict was for less than ten pounds. 268. 337.

LORD HARDWICKE, *Chief Justice*. This must be bad for the same reasons the former cases were held good. The statute of the 5. Geo. 2. c. 27. must be put out of the case, not extending to cases where the damages laid in the declaration are above ten pounds; and it appears by *Cro. Eliz.* 85. that this is erroneous, and not aided by any of the statutes of *Jeofails*.

The judgment was reversed.

Webb against Dwight.

Case 221.

THE DEFENDANT had given a bond for two hundred pounds to the plaintiff, payable at certain instalments; and the day of the first instalment being passed, and the money not paid, the plaintiff brought debt on the bond, and had judgment for the penalty, and sued out execution, and levied what was then due, together with the costs of the suit; and before the second instalment became due, the plaintiff became a creditor of the defendant, and the debt lies on a bond payable by instalments after non-payment of the first instalment; and the judgment shall stand as a security for the arrears.

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against
Dwight.

became due, the plaintiff took out a second execution for the res. due, and levied it.

But THE COURT, on motion to set it aside, said, that there being a breach, the judgment for the penalty should stand on a security, but that they would not suffer execution to be executed for more than what was regularly due; and therefore they ordered the money thus levied on the second execution to be restored (a).

(a) That the penalty of a bond is, when forfeited, the legal debt, see *The Bank v. Morris*, 2. Stra. 1029. B. R. H. 319. 4. Bro. P. C. 387. *Cottrell v. Hooke*, Dougl. 97. ; and that if an annuity secured by bond be not paid on the day, the penalty is forfeited, *Judd v. Evans*, 6. Term Rep. 399.

HILARY TERM,

The Seventh of George the Second,

IN

The King's Bench.

Philip Lord Hardwicke, *Chief Justice.*Sir Francis Page, *Knt.*Sir Edmund Probyn, *Knt.*William Lee, *Esq.*} *Justices:*John Willes, *Esq. Attorney General.*Dudley Ryder, *Esq. Solicitor General.*

The King against Hooker.

Case 222.

MR. HUSSEY moved for an information against the defendant for a cruel assault and battery committed on a person in *Newfoundland* (a).

An information will not lie for a battery in *Newfoundland*.

But the motion was denied, the offence being local, and the case of an information not distinguishable from that of an indictment.

(a) See *Dowson v. Mathews*, 4. Term entering the plaintiff's house in *Canada* Rep. 503. that trespass for breaking and will not lie in this country.

The King against Halford.

Case 223.

UPON shewing cause why an information should not go against the defendant, late mayor of the borough of *Evesham*, for not holding the borough sessions and courts of record for the borough weekly, according to the direction of THE CHARTER;

LORD HARDWICKE, *Chief Justice*, said, he could never consent to grant such informations, unless it appeared that such neglect was wilfully committed, in delay of justice, and oppression of the subject; 4. Burr. 1999.

THE KING
against
HALFORD.

ject (a); and that a contrary practice would subject almost all the mayors or other chief officers of corporations through all the kingdom to such a punishment, who, it is well known, do not, nor indeed is there any occasion to, hold courts as often as by their charter they are impowered to do.

HAWKINS, *Serjeant, on the other side*, insisted, that though it did not appear in this case that there were any particular persons who suffered by the mayor's neglect of holding courts, and that might be a very proper defence against any action, yet this being a public office, any neglect therein, though not attended with any special damage, was punishable criminally; and he urged the common distinction, that private offices, such as park-keeper, &c. were not forfeitable unless some injury was sustained, but that in public offices it was otherwise.

LORD HARDWICKE, *Chief Justice*, and PAGE, *Justice*, said, that was not law; and that it was so determined in *Serjeant Whitaker's Case* (b), that a forfeiture of a public office could not be incurred without some special damage sustained, any more than of a private one.

(a) See accord. *Rex v. Young and Pitts*, 1. Burr. 556. *Rex v. Cox*, 1. Burr. 785. *Rex v. Palmer*, 3. Burr. 1162. *Rex v. Jackson*, 1. Term Rep. 653. *Rex v. Holland*, . Term Rep. 692.; and 3. Hawk. P. C. 7th edit. ch 8. f. 74.
(b) S. C. under the title of *Reg. v. Bailiffs of Ipswich*, 2. Salk. 435.

Case 224.

The King against Pole.

If a charter fix the election of a mayor on a day certain, without any power to hold over, the poll cannot be adjourned.

S. C. B. R. H. 23. 47.

S. C. 2. Bar. 93. 447.

S. C. Cun. 11.

4. Burr. 2241.

2. Kydon Corp.

44.

UPON A MOTION for an information in the nature of a *quæ warranto* against the present Mayor of Liverpool,

The case appeared to be: By the charter, the mayor is to be elected on *St. Luke's Day*, being the eighteenth of *October*, and no provision made for holding over. Upon the eighteenth of *October* last the Corporation met, and proceeded to the election of a new mayor; but before the poll was ended, *Mr. Brereton*, the then mayor, adjourned the election to the day following, when *Pole* was elected by a majority of voices.

The objection taken to his election was, that there being no provision by the charter for the mayor to hold over, his office was determined on *St. Luke's Day*, and the proceeding to an election of the present mayor on the day following was irregular and void.

It was insisted, that this was a case not within the 11. Geo. 1. c. 4.; that the provision of that act is, "that where a mayor or other head officer of a corporation wilfully absents himself on such election days, he may proceed to an election the day following, or in his default the senior alderman, &c. may:" but that act must be construed where the first step in the election is taken on the day after the

the charter-day; that what was done here on the second day was no more than a continuation of the business begun the day before; and therefore this is not a regular election within the act. THE KING
against
POLE,

THE WHOLE COURT were clearly of opinion, that this was a void election at common law, for the reasons before given.

LORD HARDWICKE, *Chief Justice*, and TWO OTHER JUDGES, were of opinion, likewise, that this was not a case within the act.

But LEE, *Justice*, seemed to think otherwise, the words of the act being "in order to and for the completing of such election, &c."

The information was granted.

Comber against Hill.

Case 225,

UPON A SPECIAL VERDICT IN EJECTMENT, found at the assizes in *Suffex*, the case was this: *Richard Holden*, seised in fee, by his will, the eleventh of *March* 1698, devised the premises, after several preceding limitations which were spent, in this manner: "To my grandson *Richard Holden*, son of my son *Thomas*, deceased, and to *Elizabeth*, daughter of my son *Richard*, to be equally divided between them, and to the heirs of their respective bodies; and for default of such issue, to my granddaughter *Anne Holden* in fee." The testator died seised the twenty-fifth of *March* 1699. Afterwards *Elizabeth* died without issue; the lessor of the plaintiff claimed her moiety in right of *Anne* his wife; *Richard* claimed the whole as survivor, upon a supposition that there were cross-remainders created by the will.

In what case cross remainders may be raised by implication.
S. C. 2. Stra. 969.
S. C. B. R. H. 22.
S. C. 2. Bar. K. B. 367. 443.
S. C. 2. Kely. 188.

BELFIELD, *Serjeant*, for the defendant, relied principally on the case of *Holmes v. Meynell* (a). He cited likewise 4. *Leon*. 14.

DARNELL, *Serjeant*, on the other side. The case of *Holmes v. Meynell* is clearly distinguishable from the present case. There the devise was, "all my lands, &c. to my two daughters, &c. and in case they happen to die without issue, then, &c." Great stress was there laid upon the words "all" and "they;" which raised a strong implication, that the testator did not intend that he in remainder should take anything until both the daughters were dead without issue. There the devise was likewise to a nephew, a person not so nearly related as the first devisees, who were his daughters; which is taken notice of in that case as a favourable circumstance to create cross remainders.

LORD HARDWICKE, *Chief Justice*. The case of *Holmes v. Meynell* is a great authority, and will have its weight with the Court, unless it can be distinguished materially from the principal case. There can be no doubt but *Richard* and *Elizabeth* were tenants in common in tail. Then the case will be the same as if

(a) 2. Jones, 172.

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against
HILL.

the testator had given one moiety to *Richard* and the heirs of his body, the other to *Elizabeth*, &c. And if the devise had been expressed in that manner, could the subsequent words, "in default of such issue," be taken in any other sense than that in default of such issue respectively the remainder over should take place. The expressions in the case of *Holmes v. Meynell* are very different in the instances cited, which had great influence upon the Court in the resolution upon that case. I desire those who are to argue next to endeavour to find a case where, after a tenancy in common in tail created, these subsequent words, "in default of such issue," have ever been held to raise cross remainders.

In *Easter Term* following, LORD HARDWICKE, *Chief Justice*, delivered the resolution of the Court to this purpose: To raise cross remainders in a will, one of these things is necessary, either express words, or the plain and manifest intent of the testator. There are certainly no express words; but it is contended, that the intent of the party appears to be such by a necessary implication. The words relied on are, "in default of such issue," and that the word "*such*" must mean both *Richard* and *Elizabeth*. These words may, in their natural sense, be construed either conjunctively or disjunctively; upon that clause in the will the matter stands indifferent; but taking the whole will together, it seems clear there can be no cross remainders. If it had been, "in default of such respective issue," or "in default respectively," there could be no question in the case; and the word "*such*" in this clause being a relative term, and referring manifestly to the preceding words "heirs of their respective bodies," it amounts to the same thing. The relation the three devisees bore to the testator appears upon the face of the will; all of them his grandchildren; and wherever that has appeared, it has been made use of as a proper argument to direct what construction is to be put upon the will. The case of *Holmes v. Meynell* is distinguishable from this both in respect of the words and the intention of the testator. The words there are, "if they die without issue." The construction put upon the word "*they*" was if both of them, &c.: the word "respective" is wanting there; the first devisees there were the testator's daughters, and he in remainder a nephew only, which great stress was laid upon. The same observation holds with regard to the other cases cited, *Dyer*, 326. 333, 334. 4. *Leon*. 14.

Judgment for the plaintiff (a).

(a) See *Gilbert v. Withy*, Cro. Jac. 655. *Holmes v. Willett*, 1. Freem. 483. *Twisden v. Lock*, Amb. 663. *Phippard v. Mansfield*, Cowp. 797. *Wright v. Holford*, Cowp. 38. Amb. 468. 6. Bro. P. C. 156. *Burden v. Burrellite*, Dougl. 53. *notis*. *Williams v. Brown*, 2. Stra. 996. *Davenport v. Oldys*, 1. Atk. 579. *Atherton v. Pye*, 4. Term Rep. 710. *Tanner v. Dornville*, 5. Term Rep. 518.

The King *against* Griffin and Others.

Case 226.

THE DEFENDANTS, churchwardens of the parish of *Lambeth*, having been convicted on an information tried at *Surrey* assizes for A LIBEL, in giving public notice in the church, thereby desiring the parishioners to meet and assist them in correcting several abuses which, by reason of the pretended authority of the trustees appointed by the parish for the management of the workhouse there, had been suffered to be committed ;

It was insisted on, among many other objections to the information, in arrest of judgment,

FIRST, That this was no libel.

SECONDLY, That it is laid to be a libel on three persons, whose names are particularly mentioned, *cæterisque fiduciariis*, whereas the other trustees ought to be specially named, or otherwise the defendants will be subject to infinite prosecutions at the instance of the other trustees severally.

LORD HARDWICKE, *Chief Justice*. It cannot be taken upon this information, that this is a charge on the trustees of any breach of public trust, the erection of this workhouse and the government thereof not appearing to be by act of parliament or any public authority, but a breach of a private trust reposed in them by the parishioners; and any such charge is equally punishable as a libel.

As to THE SECOND OBJECTION, There are indeed authorities where, in cases of libels upon persons in their private capacities, it has been held necessary that some particular persons should be named as the subject of the libel. In the case of *the King v. Orm (a)*, there an information for a libel "on certain persons unknown" was held ill; but this was never carried so far as to make it necessary that every person injured by such libel should be specified. The omission of *cæteri fiduciarii* in this case would have been immaterial, the charge of abuses upon the three persons specified only being sufficient to maintain the information. And there is no danger of subjecting the defendants to other prosecutions for this offence; the conviction on this information will be a sufficient bar to any other, it being one single offence, though every person injured by this libel might have an action against the defendants in regard to the several and special damage which each has sustained.

Judgment for the king.

(*) 11. *Will.* 3. 1. *Seff. Cases*, 160. c. 143.

Arthur

A libel may be committed by churchwardens summoning the parish to correct pretended abuses in the trustees of the workhouse; and the trustees need not all be named.

S. C. 1. *Seff.*
Cases, 257.
S. C. 2. *Barn.*
368.

Case 227.

Arthur *against* Vanderplank.

Acceptance of rent may be pleaded in bar of debt, but not of covenant.

S. C. 2. Barn.

372.

S. C. 2. Kely.

167.

Wide Cro. Car.

388, &c.

COVENANT FOR RENT. The defendant pleaded an acceptance for rent from the assignee of the term by the lessor, the plaintiff. To this there was a demurrer.

THE COURT was clearly of opinion, that such acceptance of rent was no bar to a recovery in covenant, though otherwise in debt.

Judgment for the plaintiff.

Case 228.

Bilson *against* Hill.

Declaration by indorsee of a note against indorser is good, without stating the default of drawer.

WRIT OF ERROR in *assumpsit*, brought on a promissory note by the indorsee against the indorser.

It was objected, that no default of payment by the drawer upon application to him was laid in the declaration.

CURIA. There is an express promise of payment to the indorsee laid in the declaration; the other is matter of evidence only.

The judgment was affirmed (a).

(a) But see *Ruston v. Aspinall*, that in an action against the indorser of a bill of exchange, if the plaintiff do not allege a demand and refusal by the acceptor on the day it was payable, it is error not cured by verdict. Dougl. 679.—See also *Kyd on Bills*, 193.

Case 229.

The King *against* Sir Robert Grosvenor and Others.

No usage can controul the direction of a charter.

UPON A MOTION for an information in the nature of a *quæ warranto* against the defendants, corporation officers of the city of *Chester*, among other things it appeared, that by a charter granted the sixteenth year of *Charles the Second* the right of election of corporation officers was vested in the mayor, aldermen, and commonalty at large; the defendants were elected by part of the corporation, exclusive of the commonalty, and an usage set up to justify such election.

THE COURT held clearly, that no usage could controul the direction of a charter of so modern a date: and

LORD HARDWICKE, *Chief Justice*, mentioned the case of the *Corporation of Brecknock*, where the charter which was granted in the reign of *Philip and Mary* directed corporation officers to be chosen *de inhabitantibus*, and an usage had prevailed from the fifteenth year of *Queen Elizabeth* to elect them without any regard to inhabitancy to that time; and upon a special verdict it was held in this court, that such usage in contradiction to the charter was void, and that judgment, upon a writ of error, was affirmed in the House of

of Lords. It was agreed also in this case, that upon a judgment in an information in the nature of a *quo warranto* to the corporation itself cannot be dissolved, but only the particular franchises abused seized into the hands of the crown. *Vide 4. Mod. 52.*

THE KING
against
SIR ROBERT
GROSVENOR
AND OTHERS.

Read against Deatary.

Case 230.

UPON shewing cause why a prohibition should not go to the spiritual court, the case was this: The plaintiff below libelled for tithes for agistment of unprofitable cattle, and likewise for an annual offering of sevenpence payable at *Easter*; and claimed them as vicar of the church of *Bishop Wilton, tam ex dotatione fundatione, &c. quam ex antiqua consuetudine*. The defendant denied the right to, &c. in the words of the libel, and sentence for the plaintiff. The suggestion for a prohibition is, that the rector is entitled to such payments, and that customs are triable at common law.

A vicar cannot libel in the spiritual court for a customary *Easter* offering.—A prohibition shall not go after sentence if the court has jurisdiction of the subject.

DR. LEE against the prohibition. The payment to the rector is a new matter not pleaded below, and therefore not proper to be inserted in the suggestion. 1. *Vent. 335.* The demand here is founded on the endowment, which is certainly a matter of spiritual cognizance. The words *ex antiqua consuetudine* are inserted in all libels, and are matter of form only. As to the tithes, the words of the endowment are *decimas bladorum crostorum crescentium infra clausuras, &c.* which extend to the present demand.

S. C. Barn.
392.
6. Com. Dig.
"Prohibition"
(G. 11.).

As to the offering, The words of the endowment are of every thing *quæ ad alteragium pertinent*; a term which, in the case of *Turner v. Andrews (a)*, was construed to comprehend all ecclesiastical demands, though it seems to carry with it a more restrained sense. But however, as offerings cannot otherwise be due but by custom, and a jurisdiction of proceeding in such cases is certainly given by the statutes *De Circumspecti Agatis, &c.* the 27. *Hen. 8.* 20. the 32. *Hen. 8.* 7. and the 2. *Edw. 6.* 13. the right of trying customs in such cases in consequence is given to the spiritual courts. This motion also comes too late, being after sentence. 1. *Cro. 519.* 2. *Keb. 612.* *Noy, 70.* *Wright v. Allen, 9th Nov. 1723.* An action brought in the admiralty upon a contract laid to be made *super altum mare*, and sentence given for the plaintiff; a prohibition was moved for, upon a suggestion that the contract was made in the harbour of *Plymouth*; but it was denied, because that did not appear upon the libel, in which case only prohibition lies after sentence.

MR. BOOTLE senior. The contest here is between spiritual persons, whether the rector or vicar is entitled; and in such case the ecclesiastical courts have jurisdiction; though otherwise in the case of the laity (b). Where a defect of jurisdiction in the principal

(a) 311. 2. Roll. Rep. 55. Goldf. 149.

(b) 13. Co. 2. Roll. Abr. 310, 2. Bulst. 157. 1. Lev. 59.

matter

READ
against
DEATARY.

matter appears in the libel, prohibition lies after sentence; otherwise where it is only *defectus triationis*, as in the principal case.

MR. FAZAKERLY *on the other side*. As to the tithes, it is plain that the demand is founded on the custom, and the recovery must be accordingly; the words of the endowment extending only to the tithes of corn. The offering can be no otherwise due but by custom, and cannot be founded on the endowment; for there must have been a usage for the payment of it antecedent to the endowment itself; and therefore this right is only triable at law. Besides, this is not a dispute between ecclesiastics only; the defendant below is a layman; and it is not sufficient that a question arises in this case, whether the rector or vicar is entitled to the payment: a prohibition lies here after sentence as well as before (a).

MR. DENNISON, to prove all customary dues triable at common law, cited *Taylor v. Scott* (b), where the libel was by the Vicar of Wakefield for a customary fee of tenpence for churching women (c). The common-law courts are the proper judges of endowments, and what is granted thereby (d).

LORD HARDWICKE, *Chief Justice*. As to the offering, there is no doubt but a prohibition must go; and there is no difference between a defect of original jurisdiction and a defect of power to try the suit below. Prohibition lies as well after sentence as before (e). I know no case to the contrary, but that of suing out of the diocese; and in that case there is neither *defectus jurisdictionis* nor *triationis*; the person sued there has only a privilege of staying the proceedings against him upon a proper application to the temporal courts, which is waived, and no advantage can be taken thereof after sentence. As to the statutes which it is insisted give the spiritual courts a jurisdiction in trying customs upon which these dues are founded, that way of reasoning will prove that a *modus* for tithes is triable there; tithes being always mentioned among other customary dues; but that there can be no pretence for.

As to the point of tithes for *agistment*, &c. if a special instrument of endowment had been set out under which these tithes were claimed to be due; and it appeared to us they were not included in that endowment, there could be no doubt then but that a prohibition must go, because, as the demand would appear to us judicially not to be warranted by the endowment, it could only rest upon the custom, and that is not triable there. The case here is not so strong, because it is claimed *ex dotatione* generally, *et ex antiquâ consuetudine*. Now it is possible these tithes might appear below to be due

(a) 2. Salk. 548. Carth. 97.

(b) Easter Term, 2. Geo. 2.

(c) Lutw. 1052. Salk. 334. 3. Keb. 523.

(d) Moor, 437. 2. Roll. Abr. 335. Litt. Rep. 263.

(e) See 2. Inst. 602. 619. 2. Roll. Abr. 318. Salk. 548. 2. Burr. 813. Cowp. 424. 1. Term Rep. 3. 552. 6. Com. Dig. "Prohibition" (D).

READ
against
DEATARY.

by some endowment or other; but however, as it is not disclosed by the proceedings below what the sentence was founded on, and it might be one as well as the other, a prohibition ought to go, or otherwise the spiritual courts, by this general way of libelling, may try customs triable at common law only, without being subject to any restraint by prohibition after sentence is once given.

LEE, *Justice*. The sentence given in this case is no objection at all to the granting a prohibition. As to the tithes for *agistment*, &c. I doubt whether we can now grant a prohibition, because it does not appear but that the sentence might be warranted by some endowment or other. The inconvenience of suffering such general allegations in libels seems not so great as is apprehended, because the party may immediately apply for a prohibition when the spiritual courts begin to proceed against him upon the custom.

As to *the offering*, that being a thing merely customary is not within their cognizance. The statutes cited in maintenance of the jurisdiction below empower the spiritual courts to proceed and give sentence as well for customary dues as tithes; but still that is subject to trials of customs according to the course of the common law; and if the custom is found in favour of the person who libels, then a consultation goes, and they may give sentence, and execute the authorities which are given by those acts of parliament.

LORD HARDWICKE, *Chief Justice*. What was said by my Brother LEE about a prohibition not going after sentence in this case, as to the demand for tithes, seems very material.

Let there, therefore, be a declaration in prohibition, that this matter may come properly before the Court by demurrer.

The King against The Mayor, &c. of Shrewsbury. Case 231.

A MANDAMUS having been granted to restore *Corbet Kynaston, Esq.* to the office of alderman, a return was made to it, in which, among other things, this part of the charter is set out, which requires every alderman to be resident, either by himself or his family, within the borough or suburbs, unless in case of the plague or other contagious distemper. Then the return sets out, that *Corbet Kynaston* had not been resident, either by himself or his family, for three years before the twentieth of February 1732, though there had been no plague or other contagious distemper in the borough or suburbs: that upon the twenty-third of February 1732, the mayor and majority of aldermen and common-council met upon corporation business, and then took into consideration this non-residence of *Corbet Kynaston*, and removed him from his office for such non-residence.

A mandamus to restore an alderman, and a return that he was removed for absence.
S. C. 2. Barn. 317. 394. 440.
S. C. B. R. H. 295. 377.
S. C. 4. Bro. P. C. 271.
Moor, 135.
Bull. N. P. 211.
2. Ld. Ray. 1275.
4. Burr. 2089.
Doug. 149.
2. Ter. Rep. 772.
1. F. Vez. Rep. 6.

MR. STRANGE objected to the return.

FIRST,

THE KING
against
THE MAYOR,
&c. OF
SHEWSDURY.

FIRST, As to the merits; that it is said there was no plague or other contagious distemper in the borough or suburbs, whereas that clause ought to receive a larger construction, that if there were a plague in other parts of the kingdom it should excuse his non-residence; for it would be an act of the greatest cruelty to require his continuance there till the plague was got among them, when possibly he might be seized with it, or find a reception in any other place very difficult.

SECONDLY, It does not appear to have been a regular assembly at which he was removed; it is said only "at a meeting of the mayor and the major part of the aldermen and common-council duly assembled." Now as this was not the common and ordinary business of the Corporation, which is directed by prescription or charter to be done upon a particular day, a general summons of all the resident members was necessary to make this a regular assembly. In the case of *The King v. Strangeways and Bull*, Hilary Term, in the first year of *George the First*, it was held; that the majority of a corporation cannot proceed on any such special business, unless there be a general summons. The word "duly," in this case, is not sufficient; that is a matter of law; the fact ought to have been specially stated, that the Court might judge of the regularity of the meeting. In convictions, it is not sufficient to say, "A. B. not being duly qualified, killed game, &c." but the facts by which he appears not to be duly qualified must be set out.

THIRDLY, Though it does appear by the return that *Corbet Kynaston* was not resident, and therefore no personal notice requisite to be given in order to defend himself, yet there ought to have been some public notice or other. In proceeding by way of attainder, the party has always time given him to come in; so in cases of outlawry there are always proclamations. In *Dr. Bentley's Case (a)*, want of summons was held fatal upon a return to a *mandamus* to restore him to his academical degrees. In *Serjeant Whitaker's Case (b)*, want of summons was indeed held to be cured by appearance, but there is no pretence that the removal would otherwise have been regular.

MR. PARKER *on the other side*. The return pursues the words of the charter, that there was no plague, &c. in the borough, &c. and that is sufficient. The word "duly" is a sufficient allegation, is a matter traversable, and must now be taken to be true. No summons is necessary, it appearing that *Corbet Kynaston* was not resident in the corporation; and so it was determined in *Serjeant Glide's Case*, *Show*: 365.; and in this respect the principal case is distinguishable from those cited.

LORD HARDWICKE, *Chief Justice*. There can be no pretence that a plague in any other part of the kingdom would excuse his absence. In *Serjeant Glide's Case (c)*, it was not pretended that any

(a) 2. Bar. K. P. 19. 22.

(b) Salk. 434.

(c) 4. Mod. 33. S. C. 1. Show. 258.

364. S. C. Comb. 197. S. C. Holt,

169. 435. S. C. 12. Mod. 27. 251.

S. C. 2. Ld. Ray. 223.

public notice was requisite; and though HOLT, *Chief Justice*, differed from the other three Judges in that case, yet it was upon a matter of form only, that it did not sufficiently appear he was absent so as not to be entitled to notice. As to the objection to the word "*duly*" in pleading, this would be sufficient, and the special manner of summoning, &c. would come in evidence; and no case is cited to prove this wrong in a return. The only doubt with me is, that it is said, "the mayor and major part of the aldermen, &c.;" and it seems to me it should have been, "the mayor, aldermen, &c.;" for the act of a mayor and a majority of a corporation is the act of the whole; and it should have been set out, not as it was in fact, but according to its legal operation.

THE KING
against
THE
MAYOR, &c. OF
SHREWSBURY.

PROBYN and LEE, *Justices*, concurred with THE CHIEF JUSTICE in all but the last point, who seemed to think the return good in that likewise.

Cock against Vivian.

Case 232.

THIS was an action of *assumpsit* brought by the lessee of the market of *Helston*, in *Cornwall*. The declaration stated, that the plaintiff was possessed of the market-house, and of the toll, and of pickage and stallage, and laid an *indebitatus assumpsit* to pay a certain toll in consideration of the defendant having been permitted to set down his goods in the market, and also for pickage and stallage. There was also a count on a *quantum meruit*. On the trial, a general verdict was given for the plaintiff.

An *indebitatus assumpsit* lies for tolls.

1. Bac. Abr. 165.
1. Com. Dig. 136.

HUSSEY, *in arrest of judgment*, insisted, that the declaration was erroneous, because it appears that this was a public market, where every person had a right to deposit their goods and wares for sale, and therefore the alledged permission to set his goods there is not a good consideration for the promise, especially as the common remedy on this subject is by *distress*. Besides, an *indebitatus assumpsit* will not lie for toll any more than it will for a heriot.

SECONDLY, It is nowhere said that the goods were sold; and no toll is due unless the goods are sold, and even then it is to be paid by the buyer.

THIRDLY, A *quantum meruit* will not lie for toll, for a toll must not only be reasonable but certain; and a *quantum meruit* does not lie where a price is fixed and ascertained.

SERJEANT CHAPPLE, *on the other side*, insisted, that by custom a toll may be payable though the goods are not sold, and that pickage and stallage may be included under the word "toll." It is clear, that in antient fairs toll may be demanded for the standing of goods, though none of them are sold (*a*). It has been held, that an *indebitatus assumpsit* will lie for seavage, though no

(a) 2. Inst. 220. 1. Lev. 174.

express

Cock
against
VIVIAN.

express promise was made to pay it (a). So also it lies for a customary fine (b).

THE COURT doubted as to the *quantum meruit* for a toll, and also whether *stallage* could be included in the word *toll*; but they seemed to incline that an *indebitatus assumpsit* would lie in this case (c).

- (a) 1. Show. 35. Carth. 92. lett, 2. Willf. 95. Seward v. Baker,
(b) 3. Mod. 239. 2. Vent 175. 3 Lev. 1. Term Rep 618. in which last case it is
261. 3. Burr. 1717. Dougl. 728. expressly decided, that a general *indebitatus*
(c) See Mayor of Exeter v. Term- *assumpsit* will lie for tolls.

E A S T E R T E R M,

The Seventh of George the Second,

I N

The King's Bench.

Philip Lord Hardwicke, *Chief Justice.*Sir Francis Page, *Knt.*Sir Edmund Probyn, *Knt.*William Lee, *Esq.*John Willes, *Esq. Attorney General.*Dudley Ryder, *Esq. Solicitor General.*} *Justices.*

The King against Gibson.

Case 231.

THE DEFENDANT having been convicted of forging a note, it was objected, on the part of the crown, upon a motion for a new trial, that no such motion could be made, in the absence of the defendant, any more than a motion in arrest of judgment.

After conviction for a misdemeanour the defendant cannot move for a new trial, unless he is personally present in court.

This seemed to be the opinion of the Court.

LORD HARDWICKE, *Chief Justice*, the next day mentioned the case of *The King v. Latt (a)*, which was an information for perjury; and *The Queen v. Ridpath (b)*, which was an information for a libel; in which cases it was determined, that there is no difference between moving *in arrest of judgment* and for a *new trial* as to that purpose. And LORD HARDWICKE directed this to be observed as a settled rule for the future.

S. C. 2. Stra. 968.
S. C. 1. Seff. Caf. 428.
S. C. 2. Bar. K. B. 412. 418.
S. C. Cunn. 29. Stra. 344.

This same motion being regularly made another day, the case appeared to be this: The defendant was convicted before LORD HARDWICKE in *London*, of forging a note. The indictment set the recital of the instrument forged, and the setting it out according to the tenor.

In what case a variation in an indictment of forgery between

(a) Michaelmas Term, 7. *Will* 3.

(b) Easter Term, 12. *Ann.* 10. *Mod.* 152. S. C. *Fort.* 358.

THE KING
against
GIBSON.

out, that the defendant forged a note, dated the thirtieth of June 1713, under the hand of *Lady Macarty*. The words were "im-
"porting to be a writing whereby she acknowledged to have re-
"ceived and borrowed of the defendant, and that he had *laid out*
"and expended for her, and for goods for her use, to the amount of
"two hundred and twenty-one pounds twelve shillings;" then
the indictment goes on, "the tenor of which note or writing is as
"follows;" then the note is set out *in hæc verba*, which acknow-
ledges the receipt of money by the lady, other money laid out and
paid for her, and for goods before delivered, amounting to the same
sum.

THE EXCEPTION taken to the indictment was, that here was a
variance between the case set out as the purport of the note,
and the tenor of it; for the purport supposed money lent, money
paid for the lady's use, and other money paid for goods for her use,
to be the condition of the note; whereas it appears by the note
itself, that part of the condition of it was the sale of goods to her by
the defendant, which must be taken to be the meaning of the
words "*goods delivered*."

LORD HARDWICKE, *Chief Justice*, informed the Court what
were the reasons which induced him to over-rule the objection,
which was likewise taken at the trial.

FIRST, That the words "before delivered" might as well be con-
strued to mean money advanced by the defendant to pay for goods
delivered by a third person to the lady, as goods sold and delivered
by the defendant himself to her; and by that construction, money
paid for goods for her use, and for goods delivered to her, would
mean the same thing.

SECONDLY, That suppose this was to be considered as a va-
riance, yet as the note set out *in hæc verba* was clearly proved to
be forged, that was sufficient to warrant the verdict; there being
no necessity that every thing charged in the indictment should be
proved, but a proof of the most material fact, as there was in this
case, was all that was necessary.

THIRDLY, That what is set out as the tenor of the note is the
fact charged in the indictment; and what there is mentioned as the
purport, &c. was matter of inference and collection of the jury,
and therefore any failure therein would not vitiate.

THE COURT unanimously concurred with the *Chief Justice*,
and the motion was denied.

Case 232.

Day against Serle.

If there is a con-
tract by deed,
with unusual co-
venants between

MR. DRAPER moved for a prohibition to THE COURT OF
ADMIRALTY to stay a suit there for *mariners wages*, upon
a suggestion, that the contract between the mariners and the master
master and mariners respecting wages, they cannot be sued for in the admiralty.—S. C. 2. Stra. 968.
S. C. Cun. 32. S. C. 2. Barn. 419. 2. Salk. 424. 2. Wils. 264. 1. Vent. 343. 2. Ld. Ray.
1206. 4. Burr. 2950. 3. Term Rep. 267.

was by writing, under hand and seal, and affidavit made of the execution thereof by one of the subscribing witnesses.

DAY
against
SERLE.

MR. MARSH shewed cause against the rule, and cited the case of *Coke v. Cretchet* (a) in contradiction to the case of *Opie v. Child* (b). He insisted that prohibitions were intirely in the discretion of the Court (c); that the statute of the 2. Geo. 2. c. 36. f. 2. requiring all contracts between masters and mariners to be in writing, it would be very hard if any imposition by the master upon the mariners, in prevailing upon them to set their seal, should deprive them of that remedy which they would otherwise have, of recovering their wages in the admiralty court.

MR. DRAPER. The case of *Coke v. Cretchet* says only "charter party," which possibly might be between the master and owners, and therefore it is not applicable to the present case. This contract appears to be under the hands and seals of the master and mariners, and they having accepted of him as their paymaster, they cannot have recourse to the owners, as the suit below was, but the master only is chargeable. In *Garnham v. Bennet* (d), upon a motion for a new trial the case was, the master of the ship bespoke goods for the ship and gave his note for the payment of the money; and it was held, that the merchants, by accepting the master as their payer, by the note given, had disabled themselves from recovering against the owners (e). The statute 2. Geo. 2. c. 36. is not material, that requiring the contract to be in writing only, and not under hand and seal.

LORD HARDWICKE, *Chief Justice*. It seems clear, that the contract entered into between the master and the mariners will not deprive them of any remedy which they would otherwise have in the admiralty court. The statute 2. Geo. 2. c. 36. requires such contract to be entered into between, &c. and any right which they had of recovering before, being saved by that act, I always thought, that wherever there was any contract by deed, or there were any covenants other than the usual ones, the court of admiralty had no jurisdiction. And in the present case here were covenants for payment of the wages, which are not usual: As a covenant on the part of the mariners, that if they were not capable of performing the voyage, and doing the business of the ship, they would deduct so much of their wages as two of the officers of the ship should think reasonable; that if they carried goods of their own, without the privity and consent of the master, or if they left their own ship and went aboard any of the king's ships in his service, a privilege expressly allowed by the 2. Geo. 2. c. 36. that they should forfeit their wages. And the contract is also by deed.

(a) 3. Lev. 60.

(b) 1. Salk. 31.

(c) 1. Salk. 33.

(d) Michaelmas Term, 2. Geo. 2.

1. Bar. K. B. 96. S. C. 2. Str. 816.

(e) See Rich v. Coe, Cowp. 636.

Farmer v. Davies, 1. Term Rep. 108.

DAY
against
SERLE.

THE OTHER JUDGES being of the same opinion, the rule for a prohibition was made absolute (a).

(a) See *Howe v. Napier*, 4 Burr. 1209. *Mcnetene v. Gibbons*, 3 Term 1944. *Bew v. Parry*, 2. Ld. Ray. Rep. 267.

Case 233.

Wainwright against Bagshaw.

After the allowance of churchwardens accounts by the minister and parishioners, the spiritual court has no jurisdiction.

S. C. 2. Barn.

421.

S. C. 2. Stra.

974.

S. C. Cunn. 33.

S. C. And. 11.

2056.

MR. ABNEY shewed cause why a prohibition should not go to the spiritual court of *Litchfield*, to stay a suit there against the now defendants, churchwardens, to which they pleaded an allowance of their accounts by the minister and a great majority of the parishioners and inhabitants; and that plea refused below.

He insisted the plea did not pursue the canon (a), which requires such account to be given before the parishioners and inhabitants, whereas a mere inhabitancy in a parish will not give any right to a person to concern himself in allowance of the accounts. He insisted that there were many extravagant items in the accounts, such as ought not to be allowed in justice to the parish, which they were ready to verify by affidavit; and that this was the only remedy they had of setting this matter right.

MR. STRANGE, on the other side, insisted, that after an allowance of the accounts by the minister and the parishioners the spiritual court had no jurisdiction, however extravagant the charge might be upon the parish; and cited *Dr. Prideaux of the Office of Churchwardens*, 103.

MR. DENNISON cited the case of *Nutkins, Churchwarden of Hammer Smith, v. Robinson and Carey*, in the exchequer, *Michaelmas Term*, 1. Geo. 2.; and the case of *Hawton, Churchwarden of St. Alban, Wood-street, v. Kendrick and Others*, last Easter Term in the same court, where it had been so determined; and *Lutw.* 1028.

LORD HARDWICKE, *Chief Justice*. The jurisdiction of the ordinary extends no farther than to compel the churchwardens to come to an account before the minister and parishioners, for he cannot himself take the account, or enter into an enquiry into the reasonableness or extravagance of the charge, if the parties interested acquiesce in it; and it would be a very absurd thing to suffer that court to proceed, when the sentence against the churchwardens can only be *quod computent*, and that has been done already; and should it go again before the parishioners the accounts might be allowed in the same manner, and the suit prove of no consequence at all. The words "parishioners and inhabitants" must be construed conjunctively to mean only such inhabitants as were parishioners.

The rule was made absolute (b).

(a) The 89th Canon of those made in the year 1603. 289. *Nutkins v. Robinson*, Bunt. 247. and *Adams v. Rush*, 2. Stra. 1137.

(b) See *Snowden v. Herring*, Bunt. *Leman v. Goulty*, 3. Term Rep. 3.

Harri

Harris *Qui Tam* against Reely.

Case 234.

WRIGHT, *Serjeant*, moved to stay proceedings in an action, grounded on the 15. *Car.* 2. against a butcher for selling living cattle; no affidavit having been made previous to the action brought, that the offence was committed within a year before the time of bringing the action, and in the county where the action was brought, as is required by the 21. *Jac.* 1. c. 4. (a).

A rule to shew cause was granted.

On the day of shewing cause MR. KETTLEBY said, this being an offence created subsequent to the 21. *Jac.* 1. c. 4. the method of proceeding for recovering the penalty is not controuled by that act, for that it has been solemnly settled, that the statute of 21. *Jac.* 1. c. 4. is repealed *pro tanto*, that is, as to offences created since that time (b).

WRIGHT, *Serjeant*, on the other side. The statute of 21. *Jac.* 1. c. 4. disables informers from suing for a penalty "in any of his majesty's courts at *Westminster*, unless the offence is committed in that county, but before justices of assize, &c.;" then comes another clause, requiring the affidavit to be made. Now the statute of *Charles the Second* upon which this action is grounded, empowering the informer to sue for the penalty in any of his majesty's courts of record, repeals that clause of the statute 21. *Jac.* 1. by which they were restrained from suing in the courts of *Westminster*. But that other clause relating to the affidavit stands unrepealed, and must still be complied with in all popular actions, though for offences subsequent to that statute 21. *Jac.* 1. c. 4.; and that must be taken to be the meaning of what is said in *Salkeld* "repealed *pro tanto*;" that is, repealed as to the locality of such actions, but not as to the method of proceeding.

LORD HARDWICKE, *Chief Justice*. That clause in the 21. *Jac.* 1. c. 4. with regard to the affidavit, &c. cannot now be construed to extend to actions brought for penalties inflicted by succeeding statutes, the words being "on the said penal statutes," which confines the clause to the offences created by an act of parliament then in being, and not by such as have been made since. The meaning of the words "repealed *pro tanto*," mentioned in *Salkeld*, must be, that with respect to offences created by subsequent acts the 21. *Jac.* 1. cannot take place, but is *pro tanto* repealed; and that construction is agreeable to the second resolution in *Hicks's Case*.

THE OTHER JUDGES concurring unanimously, the rule was discharged.

The statute 21. *Jac.* 1. c. 4. which requires an affidavit of the offence having been committed within a year, before a penal action can be brought, does not extend to actions for penalties inflicted by subsequent statutes.

S. C. 2. Barn.

413. 420.

S. C. Can. 30.

1. *Stra.* 415.

2. *Stra.* 1081.

4. *Hawk. P. C.*

ch. 26. f. 34, 35.

3. *Term Rep.*

364.

4. *Term Rep.*

109.

(a) See 2. *Hawk. P. C.* ch. 26. sect. 26 to sect. 50. *White v. Boot*, 2. *Term Rep.* 274. *Leigh v. Kent*, 3. *Term Rep.* 362. *Ball v. Atwood*, 1. *H. Bl. Rep.* 546.

(b) *Rex v. Gaul*, 1. *Salk.* 372. *Rex v. Hicks*, 1. *Salk.* 373.

Case 235.

Harris against Burley.

Execution may be taken out on a judgment in the palace court, removed and affirmed, and error *coram vobis* brought.

S. C. 2. Bar.
430. 432.

MR. BENNE moved for leave to take out execution on a judgment in **THE PALACE COURT**, removed hither by writ of error, and the judgment affirmed thereon; and since that a writ of error *coram vobis* brought; and cited *Hern v. Busbel*, *Easter Term*, in the sixth year of *George the Second*, where the same was done (a).

MR. STRANGE on the other side. The plaintiff in error cannot assign matter of law and of fact too for error; and he ought not to be precluded from taking advantage of either, some way or other. The case of *Thompson v. Hunt*, *Easter Term*, in the fourth year of *George the Second*, is the same with the present; there judgment in *assumpsit* in **THE PALACE COURT** was affirmed on error brought in this court; and on a writ of error *coram vobis* afterwards brought, a motion was made to stay the proceedings, on an affidavit that *coverture*, the fact now assigned for error, was given in evidence at the trial, and yet a verdict for the plaintiff; and a rule was obtained to shew cause, but that rule was afterwards discharged. The case of *Hern v. Busbel* is clearly distinguishable from this case; for there the *coverture* was pleaded below, and the Court would not suffer the same fact to be assigned for error; for if there should be a verdict for the plaintiff in error, that contradiction would appear upon the record, whereas in the present case the general issue of *non assumpsit* was pleaded.

MR. PARKER on the other side. There can be no question but that upon the first writ of error, either error in fact or in law might have been assigned; and therefore the plaintiff in error not prejudiced. It has been often determined, that after a judgment affirmed in the exchequer chamber upon error there brought, and the record remitted to this court, no writ of error *coram vobis* in the king's bench lies afterward (b); and he cited the case of *Lambden v. Prettyjohn*, *Hilary Term*, in the twelfth year of *George the First*, when upon such a writ of error brought after an affirmation in the exchequer chamber, and the infancy of one of the defendants in the action assigned for error, it was held no such writ of error would lie.

LORD HARDWICKE, *Chief Justice*. The plaintiff in error may certainly assign matter in fact or law for error, but not both; but I do not see why that may not as properly be done, as to suffer two different writs of error to lie. A writ of error *coram vobis* lies when the first is abated by death, and so the party deprived of assigning any error in fact, to remedy which a writ of error *coram vobis* lies; and not where there has been a judgment of affirmation.

At another day **LORD HARDWICKE**, *Chief Justice*, delivered the opinion of **THE COURT** in this manner: As to the case of *Thompson v. Hunt*, we can no otherwise judge of that than as it appears upon the rules which were made in the cause; the rule

(a) *Apte*, 168.

(b) 1. *Vent.* 207. 2. *Lev.* 38. 3. *Keb.* 28, 29.

HARRIS
against
BURLY.

was to shew cause why the assignment of errors should not be set aside, but no rule to stay the proceedings on the writ of error. There is but one modern case in favour of this opinion, and that is in *Salk.* 337. but that case, as it appears by the Roll and by *Lilly's Entries*, is misreported. The authorities in the Books go upon this distinction, that when the record below is not well removed, as by a variance between the writ of error and the judgment below, &c. there the party must bring a new writ of error; but where the record is well removed, and the writ of error is abated by the death of the parties, or the plaintiff in error is nonsuited, there a writ of error *coram vobis* lies, but never after a judgment of affirmance. There is but one old authority which I can find to the contrary, and that is in 1. *Roll. Abr.* 754, 755. pl. 15. and that case is manifestly ill reported. The Book says, that "after a judgment of reversal in the king's bench in *Ireland*, of a judgment obtained in the common pleas, and that judgment of reversal in *Ireland* reversed in the king's bench in *England*, and that the judgment given in the common pleas in *Ireland* shall stand, that a writ of error *coram vobis* may afterwards be brought in the king's bench in *Ireland*, of the judgment obtained in the common pleas there." *Mr. D'Anvers* supposes the writ of error *coram vobis* should be said to be brought in the king's bench in *England*, and he is certainly right; but still that will not do. This same case is also reported in *Yelv.* 117. and by that it appears the first writ of error in the king's bench in *Ireland* was discontinued, and that was the reason a writ of error *coram vobis* lay in the king's bench in *England*; because in the king's bench in *Ireland*, there was no judgment of affirmance or reversal of the first judgment there.

MR. STRANGE said, the present case was distinguishable from any cited, because the writ of error was brought by the *feme* only, and the writ of error *coram vobis* by the *baron* and *feme*; and this was the first opportunity the *baron* had of assigning this matter for error.

But it was said by *LORD HARDWICKE* that that made no difference.

IT WAS AGREED, that writs of error *coram vobis* are not within the statute which requires bail on writs of error.

The rule was made absolute.

Dobbs against Passier.

Case 236.

DECLARATION IN EJECTMENT was delivered the third of *January*, and judgment signed, for want of the defendant's appearance on the sixteenth of *February*: on the twenty-fifth of *February* the landlord had notice of the judgment; on the twenty-eighth *MR. JUSTICE LEE* was applied to, that upon payment of

The Court will set aside a judgment though irregular, in ejectment, in order to try the merits.

S. C. 2. Stra. 975. S. C. 2. Bar. 431.

P 4

the

DOES
against
PAINTER.

the costs the judgment might be set aside, and the defendant let in to try the merits at the next assizes, which were the sixth of *March* in *Essex*; MR. JUSTICE LEE made an order to that purpose, which was not complied with.

Upon shewing cause, by the plaintiff, why the judgment should not be set aside, it was admitted to be the practice of the Court in all cases, except *ejectment*, that where a judgment had been obtained, though strictly regular, yet if there could be a trial had without any prejudice to the plaintiff, as where no loss of time, &c. the Court would set aside the judgment and order the merits to be tried; but that in *ejectment* that was never done, the right not being determined in *ejectment* the possession only changed, and the party was at liberty to bring a new *ejectment* whenever he pleased.

MR. STRANGE *contra*. Though the court of common pleas always exercised the power of setting aside judgments under the circumstances of this case; yet this Court would not formerly do it without consent on both sides; but in the case of *The King v. Glass* (a) this Court came into the same practice with the other Court, and that has been pursued ever since here. Formerly, likewise, it was an answer to a motion for a new trial, to say it was in *ejectment*, which was not conclusive; but of late no regard is had to that answer. The changing of possession is a thing of very great consequence, it being often difficult for a person, though really entitled to an estate, to make out his right, and so may fail; whereas he would be under no such hardship if he was defendant, as the plaintiff in *ejectment* must recover by the strength of his own title.

THE COURT was clearly of that opinion, upon conference with the Judges of the court of common pleas, and said there was no distinction made in the court between *ejectments* and other actions.

The rule was made absolute (b).

(a) Hilary Term, 2. Geo. 2.

(b) See Doe, on the demise of Troughton, v. Roe, 4. Burr. 1996.

Case 237.

Damage against Watkins.

In debt on a judgment where the debt is under 10l. the defendant cannot be held to bail, though by the addition of costs it is above that sum.

WRIT OF ERROR brought here on a judgment in an action for three guineas in the court of common pleas; the judgment was for fourteen pounds debt and costs, and upon action brought against the plaintiff in error on that judgment, he was held to special bail.

MR. DENNISON moved, that the plaintiff in error might be admitted to imparl to the action, pending the writ of error, and might be discharged on filing common bail.

S. C. 2. Stra 975. S. C. 2. Bar. 434. 3. Burr. 1389. 2. Stra. 1077. 4. Burr. 2117. 1. Will. 120. 5. Burr. 2660. Cowp. 128.

Mr.

MR. STRANGE, *contra*, cited *Chambers v. Robinson*, Michaelmas Term 1. Geo. 2. where it was determined that special bail might be required in the first action of debt brought on the judgment, though not in any subsequent action brought thereon.

CAMAGE
against
WATKINS.

MR. DENNISON. In that case no writ of error was brought, and until that is determined it does not appear that any debt is due.

LORD HARDWICKE, *Chief Justice*. It is pretty extraordinary that the pendency of a writ of error should not be a good bar to an action brought on the judgment, as it is a *superfedeas* to any execution; but, however, in tenderness to the plaintiff in error, we never compel him to plead, but give him leave to imparl; and there can be no pretence to hold the party to bail while the writ of error is depending.

PROBYN, *Justice*. It is a constant rule, that no bail is required in debt on a judgment in debt, where it cannot be required in the original action, which appears here to have been but for three guineas, though the demand is now swelled up to fourteen pounds.

THE CHIEF JUSTICE agreed, and said, at that rate bail would be given for costs, which ought not to be (a).

(a) But it is now decided in the case of *Lewis v. Pottle*, 4. Term Rep. 570. that a defendant may be held to special bail in an action on a judgment for ten pounds, for damages and costs, though the original debt was under ten pounds.

Carey against Hinton.

Case 238.

TRESPASS *quare clausum fregit*, &c. The defendant pleaded, that the *locus in quo*, &c. was his own proper land. The plaintiff replied, that it is his estate of inheritance and his proper lands, and traversed that they were the proper lands of the defendant. And issue joined thereon, and verdict for the plaintiff.

An informal issue is aided by verdict.

MR. KETTLEBY moved for a repleader, this being an immaterial issue, the words "proper land" not implying any possession in the plaintiff, without which this action, being a possessory one, cannot be maintained, and they will as properly signify a reversion or remainder in fee.

S. C. 2. Keil. 153.
S. C. 2. Stra. 973.
S. C. 2. Bar. 363. 436. 449.
5. Com. Dig. "Pleader"
(R. 18.) (S. 4.)

MR. DENNISON. This is an informal issue only, and not an immaterial one, and so cured by verdict. 5. Co. *Nichols's Case*. 2. Bulst. 41. *Moor*, 464. 1. Syd. 289.

N. B. The meaning of the plea *liberum tenementum* is, that the defendant is seised in fee and has a right to enter, and the possession of the plaintiff is admitted by such plea.

MR. STRANGE, at another day. This defect, if any, is cured by the verdict (a). In trespass, the defendant pleads, that A. was seised and demised to him, and then prescribes for a way; and upon a

(a) 5. Co. 43. Salk. 365. Yelv. 227. and the case of *Yateman v. Muston*, 10. Mod. 228. 300. Gilb. 305.

motion

CAREY
against
HINTON.

motion in arrest of judgment, after verdict, it was objected, that the word "*seifitus*" might as well mean an estate for life as in fee; and if it be construed for life only it will be bad, as a prescription cannot be annexed to such an estate; but this defect was held to be aided by the verdict. He cited also 1. *Cro.* 87. 2. *Cro.* 678. 2. *Saund.* 317. *Hob.* 126.

LORD HARDWICKE, *Chief Justice.* The question is, Whether this be an immaterial issue, or only an informal one? If immaterial, though the fault lie in the defendant's plea, yet the Court cannot give judgment, but there must be a replender. But here seems to be only a defect in form; the defendant here pleads that they are his proper lands, by which he claims some kind of property in them or other. The plaintiff replies and says, they are his estate of inheritance and his proper lands, and not the proper lands of the defendant. And it being found by verdict that they are not the proper lands of the defendant, his plea is satisfied; and it appears that now he has not any property whatsoever in him, and therefore the substance and merits of the case seem to have been in issue, and determined by the verdict,

PAGE and PROBYN, *Justices*, were of the same opinion.

But LEE, *Justice*, seemed to think it a defect not cured by the verdict; for though it does now appear that the defendant had no property in the land, yet it does not appear that the plaintiff had such an immediate interest in the estate under which he could maintain an action of trespass.

At another day LORD HARDWICKE, *Chief Justice*, gave the resolution of THE COURT. The verdict finds, that the close, &c. is, and at the time, &c. was the estate of inheritance and proper lands of the plaintiff, and not the proper lands of the defendant. We are all of opinion that this defect is aided by the verdict, though it would be fatal on demurrer. Perhaps it might not have been sufficient to find that these were the proper lands of the plaintiff; but the verdict goes further, and finds that they were the estate of inheritance of the plaintiff, which in construction is the same thing as if the party had alledged he was seised in fee or in tail. The words *liberum tenementum* do not by their natural force express a freehold in possession, but they have obtained that meaning by construction, because a precedent interest shall not be intended, and the same rule holds in construing the words "estate of inheritance." The case of *Yateman v. Buxton* is a very strong one to support this verdict, and in that case 1. *Vent.* 123. was cited, by which it appears, that the Court will intend in favour of verdicts. But to make this bad there must be an intendment of a prior interest in some other person, in order to destroy this verdict.

The rule was discharged.

Devenish

Devenish against Mertins.

Case 239.

TRESPASS for taking away a gun from the plaintiff. The plaintiff discontinued by leave of the Court.

In what case double costs shall be awarded.

BAINES, *Serjeant*, moved for the direction of the Court to THE MASTER to tax double costs, according to 7. *Jac.* 1. c. 5. upon producing an affidavit, that the action was brought against the defendant for what he did in the execution of his office as justice of peace under the 5. *Ann.*

S. C. 2. Barn. 373. 432. 449. S. C. 2. Stra. 974. Bull. N. P. 332.

LEE, *Justice*, cited the case of *Cathedral v. Cowper (a)*, where, in a case of the like nature, a suggestion of the like nature was entered upon the roll, as a foundation to enable the party to double costs,

MR. HAYWARD, *for the plaintiff*, insisting that the fact in the affidavit was otherwise, a rule was granted to shew cause why such a suggestion should not be entered, that the party might have an opportunity of controverting the fact.

LORD HARDWICKE, *Chief Justice*, gave the resolution of THE COURT. There are two questions: THE FIRST, Whether the defendant be entitled to double costs under the statute *Jac.* 1.?

THE SECOND, What is the proper method of awarding them?

As to THE FIRST, Though it has been insisted upon that there ought to be a previous conviction of the offender, before the justice can justify the taking away the gun, that seems not necessary under this act of the 5. *Ann.* the same authority, by the same clause, being given to lords of manors, who cannot as such convict. It appears plainly by affidavits, that this action was brought against the defendant for what he did in the execution of his office as a justice of peace.

As to THE SECOND QUESTION, No suggestion upon the roll is necessary or proper in this case. All the cases cited, where such a suggestion has been entered, are either after verdict and no certificate by the Judge of *nisi prius*, or after nonsuit; in both these cases a suggestion is very proper, because there a judgment is given for the defendant, which is a proper foundation for entering a suggestion afterwards (b). But in the case of a *discontinuance* no judgment at all is given, but both parties are out of court, and no costs at all can be given in the common case of discontinuance. Indeed when a *discontinuance* is with leave of the Court, we always do it upon payment of costs, but the party has his remedy for them on the rule only; the same manner of remedy must be for double costs.

(a) 2. Kely. 59. 2. Bar. K. B. 103. K. B. 171. Anonymous, 2. Vent. 45. and Grindley v. Holloway, Dougl. 294.

(b) But see Anonymous, 2. Bar.

Direction

DEVENISH
against
MARTINS.

Direction was given to the master to tax double costs, and upon payment of them the plaintiff to be at liberty to discontinue.

Case 240.

Lumley against Palmer.

A parol acceptance is sufficient in an action against the acceptor of a bill of exchange.

S. C. B. R. H.
74.
S. C. 2. Stra.
1000.
S. C. Bac. Abr.
611.

ACTION against an acceptor of a bill of exchange, tried before **LORD HARDWICKE**, in *London*, this Term. Upon the evidence it appeared to be a *verbal acceptance* only, which **LORD HARDWICKE** thought sufficient. The statute 3. & 4. *Ann. c. 9. s. 5.* he said, made an acceptance *in writing* necessary only for the purpose of charging the drawer, on protest, with damages and interest, and not to bar the party from charging the acceptor; and by no other construction could the ninth section of that act be reconciled. There was a verdict for the plaintiff, with liberty given to the defendant to move the Court.

DARNELL, *Serjeant*, moved for a new trial, and cited the case of *Rea v. Maggot (a)*, at the Sittings after last Term in the common pleas, where his client was nonsuited for this objection. It was agreed, that **LORD RAYMOND** always ruled it in the same manner **LORD HARDWICKE** did this.

LORD HARDWICKE, *Chief Justice*, said, It was much to be wished the courts of *Westminster-Hall* were more uniform in their resolutions, especially in cases which occur so often, and which are of such universal concern; and adjourned the determination of it until he had conferred with *Chief Justice EYRE*.

N. B. The case of *Erskine v. Murray (b)* was cited, which was an action against an acceptor of a bill of exchange; demurrer to the declaration, because the acceptance was not laid to be in writing; and the objection over-ruled.

LORD HARDWICKE, *Chief Justice*, said, he thought that case no authority, one way or other, in this case; for though an acceptance in writing should be necessary, yet it need not appear on the declaration, but it would be sufficient to give it in evidence; which construction has prevailed on the statute of Frauds, in regard to things required to be in writing.

Adjourned (c).

(a)

(b) Michaelmas Term 2. Geo. 2.
2. Stra. 817. S. C. 2. Ld. Ray. 1542.

(c) In order finally to settle this point, it was ordered to be argued, and the Court was finally of opinion that the di-

rection in the present case was right, and therefore ordered the *posse* to the plaintiff. 2. Stra. 100. See also *Julian v. Shobroke*, 2. Will. 9. *Pillam v. Van Microp*, 3. Burr. 1672. *Sproat v. Mathews*, 1. Term Rep. 182.

The King against The Bishop of Litchfield.

Case 241.

AMANDAMUS was granted to the *Bishop of Litchfield* to license one *Rusworth*, who had been elected by the inhabitants of the city of *Coventry* usher of a free grammar-school there, founded in the reign of *Henry the Eighth* by *Mr. John Hales*.

To this *mandamus* the bishop returned, that by the antient canon law the power of licensing school-masters belonged to the ordinary. Then the canons of 1603 are set out, the seventy-seventh of which requires such licence to be had; and that *Rusworth* is a person in holy orders; that a great many persons who are electors were dissatisfied with his election; that applications had been made to the bishop, by way of petition and affidavits, to suspend the granting him a licence until the next visitation, when they would make it appear that he was a person of a very profligate and scandalous life, and very unfit for the education of children; that at the visitation a *caveat* was regularly entered against granting such licence; that *Rusworth* appeared thereon, and the articles of complaint were exhibited against him, which in the return the bishop set out *in hæc verba*. Then the bishop says, that he has not refused to grant a licence, but has only suspended the granting of it until he has received satisfaction whether he is a person proper to be licensed or not.

The bishop may take a reasonable time to enquire the character of a person elected usher of a free grammar-school before he license him.

S. C. 2. Stra.

1023.

S. C. 2. Barn.

365. 428.

S. C. And. 367.

S. C. 2. Kely.

287.

Comy. 44S.

BIRCH, Serjeant, against the return. The allegation, that by the canon law the ordinary has a power to compel school-masters to take out a licence, as a qualification to teach school, must be proved on the other side. It does not appear what the nature of the affidavits is, nor that they were sworn before a person properly authorized to administer an oath, as is necessary (a). The strictest certainty is required in returns (b). It does not appear that *Rusworth* was summoned to answer the charge before the licence was refused, which is necessary in all cases. In the case of *The King v. Dr. Bentley* (c), it was held that there could be no suspension or degradation without a previous summons. The articles exhibited against him are not material, there being no sentence therein.

MR. PARKER on the other side. A *mandamus* lies not for such an office as this (d). In the case of *Vincent v. The Bishop of London* (e) that of *Tutton v. Reynolds* (f) was cited, where it was determined, that upon the ordinary's refusal to license a lecturer a *mandamus* lies not, but the remedy is by appeal. He then cited several authorities from the canon law in proof of the ordinary's power of licensing; and the 23. *Eliz. c. 1. f. 6.* the 1. *Jac. 1. c. 4. f. 9.* and the 13 & 14. *Car. 2. c. 4.* as so many parliamentary recogni-

(a) Latch, 39. 133.

(b) Salk 432.

(c) 2. Stra. 912.

(d) Stiles, 457. 1. Sid. 40. 1. Keb. 5.

(e) Trinity Term 13. Geo. 1. in the court of exchequer.

(f)

tions

THE KING
against
THE BISHOP
OF
LITCHFIELD.

tions of that right. The ordinary may punish for teaching without licence (a). The uncertainty of the return, with respect to the affidavits, is not material, for it appears that this matter is depending in a proper court, and until it is determined no *mandamus* lies (b). A *mandamus* lies not to compel the granting probate of a will, while it is in controversy below (c). A *mandamus* was refused to admit a lecturer, it appearing the right was in controversy, and in a proper method of determination (d). The ordinary in this case acts judicially, and not ministerially, and in such case a *mandamus* lies not. This is like the ordinary's power of examining a presentee to a living, and he is the sole judge of his qualification. 15. Hen. 7. c. 8. 5. Co. 57 (e).

LORD HARDWICKE, *Chief Justice*. There are several things considerable in this case: FIRST, With regard to the ordinary's power of compelling school-masters to be licensed: SECONDLY, Whether he acts judicially or ministerially in this case: THIRDLY, Whether sufficient matter be disclosed to the Court to induce them to suspend the granting a peremptory *mandamus*.

As to THE FIRST, It is pretty extraordinary how the keeping a grammar-school should be matter of ecclesiastical consufance. Many authorities have been cited from the canon law in maintenance of that power, but that is not sufficient, unless it appear that those canons have been received. The canons of 1603 are not obligatory on the laity, as they have never been confirmed by act of parliament; but, however, that is not material here, this being the case of a clergyman.

As to THE SECOND, If the bishop here acts judicially, a *mandamus* lies not to compel him to grant a licence, but only to determine the one way or the other; as we often grant them to give sentence, generally, without directing them what sentence to give; so to give judgment in inferior courts: but if he acts ministerially, and it appears to us that the person applying for the *mandamus* is qualified for the office he prays to be admitted to, then a *mandamus* goes requiring his admission. I should doubt whether he acts in a judicial capacity in this place: the office of parish-clerk seems to be much more of ecclesiastical consufance, yet there the ordinary acts only ministerially, and *mandamus*'s are often granted.

As to THE THIRD POINT, It seems very considerable, that a *caveat* being entered, and the matter properly depending in the bishop's court, that should be a temporary bar to any *mandamus*. This is much like the *Case of Sir Richard Raines*.

LEE, *Justice*. Whether teaching school is a matter of temporal or ecclesiastical consufance has been much litigated, nor do I know whether it has ever been determined; the last time this matter came in question, was in the case of *Matthews v. Burdett* (f).

(a) 2 Lev. 222.

(b) Sir Rich. Raines' Case, 5. Mod. 374.

(c) 7. Mod. 143.

(d)

(e) Sum. 88.

(f) Salk. 673.

It has been, indeed, determined to be of temporal cognizance in respect to the penalty inflicted by 1. Jac. 1. c. 4. (a). But that question seems not very material in this case. The acts requiring a licence to be had necessarily imply a power in the ordinary of granting such licence; and in consequence of that it seems they have a discretionary power of judging of the qualifications of persons to be licensed. In the case of *The King v. Wallis* (b), on the like application for a *mandamus* to grant a licence to a schoolmaster, LORD PARKER, *Chief Justice*, POWIS and EYRE, *Justices*, held that such *mandamus* would lie; PRATT *contra*; but it appearing the right was in controversy in a proper manner, it was denied until that matter was determined. There are certainly several authorities, since that case in *Styles*, that a *mandamus* will lie in this case. Of late, *mandamus*'s have been carried much farther than formerly.

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LORD HARDWICKE, *Chief Justice*. I make no doubt but the ordinary has power of judging of the person; but it is very material whether that is founded on the canon law, or any implied authority by the several acts of parliament. If the first, this Court has nothing to do in it, but the party must take his remedy by appeal to some superior ecclesiastical court; but if he derive his power from the temporal law, he must proceed according to the limitations annexed to it; and we are judges whether that power is properly executed or not.

Adjourned.

(a) Carth. 464.

(b) Trinity Term, 12. Geo. 1.

The King against Dr. Bettessworth.

Case 242.

MR. TAYLOR moved to supersede a *mandamus* to the prerogative court to compel the probate of a will *quia erroneè emanavit*. Upon producing an affidavit, and the proceeding in the court below, whereby it appeared the will was litigated there, and to prove that the Court would supersede a *mandamus* under those circumstances, and not require a return to be made thereto, he cited *Sir Richard Raines' Case*, 5. Mod. 374.

The Court will not supersede a *mandamus* to compel probate, if it issued before the will was litigated.

S. C. 2. Fa. n.

420.

S. C. And. 365.

S. C. 2. Stra.

857.

S. C. 1. Barn.

291. 331. 424.

LORD HARDWICKE, *Chief Justice*. It appears the litigation of the will was subsequent to the time of the *mandamus* issued, and in that respect distinguishable from the case cited, as this writ can hardly be said to have issued erroneously, when at that time there was no controversy about the will; and when there is none, a *mandamus* properly lies.

There was a rule to shew cause; which was afterwards made absolute by consent of the other side; and the *mandamus* went.

The

Case 243.

The King *against* Refit.

Indictment for
extortion.

S. C. 2. Barn.

436.

S. C. Cus. 36.

THE DEFENDANT having been found guilty of extortion, for insisting on extravagant fees from several tradesmen, as servant to *Justice Robt*, clerk of the king's market;

MR. STRANGE moved in arrest of judgment, that the indictment was for taking fourteenpence for examining, marking, and sealing, fourteen pots; and though the defendant could not be justified in taking any fee for examining, yet it appears by 4. *Inst.* that for marking and sealing there is a fee due; and the offence being charged entire, the judgment is ill.

THE COURT were clearly of opinion, that the defendant being found guilty generally of the indictment, they could not enter into any enquiry of that nature now.

And the objection was overruled.

Case 244.

The King *against* The Archbishop of Canterbury.

Motion for a
mandamus refused,
because copies of the statutes were not
produced.

MR. KETTLEBY moved for a *mandamus* to be directed to the archbishop to admit *Mr. John Anstis* to a fellowship of *All Souls College*, in right of his being related to **THE FOUNDER**, according to the provision of the statutes, the power of supplying this vacancy having devolved to the archbishop, as is directed by the statutes when there has been no election by the College within the time prescribed for that purpose.

But the original statutes not being produced, nor any copy regularly attested,

THE COURT denied the motion, without entering into the question, Whether a *mandamus* would lie or not? And though it appeared by affidavit, that application had been made to the College to inspect the statutes, and take a copy, and that denied, yet **THE COURT** said, they could give no relief by rule or otherwise, there being no proceedings depending in that court; but the remedy must be by bill of discovery in equity.

Case 245.

The King *against* Ellams.

The Court will
grant leave to amend an information *quo warranto*, if it will
not tend to delay the trial.

S. C. 2. Bar.

402. 440. 445.

INFORMATION in the nature of a *quo warranto* against the defendant as mayor of *Chester*. The defendant, in his plea, set out the charter of incorporation in the time of *Henry the Seventh*, by which it appeared, that the citizens of the city, inhabiting within the city and the hamlets and suburbs thereof, are to nominate two aldermen, one of which is to be elected mayor by the mayor, aldermen, and sheriffs; and then set out the nomination of himself by a major

major part of the citizens, not saying anything about their inhabitaney. To this there is a demurrer, and issue taken on the allegations in the plea of his being an alderman; which issue went down to trial, but no trial was had thereon, by reason of a challenge to the array.

MR. HUSSEY moved to amend the plea with respect to the omission of alledging the inhabitaney. It is no unusual thing for the Court to allow amendments, even in indictments and informations for misdemeanors (a). The case of *the King v. Hayes* (b) was an indictment for forgery; and after trial and special verdict found, the Court gave leave to amend the record, which was *perochia*, and to make it *parochia*. These informations are in the nature of civil suits; and by the 9. *Anne* it is expressly provided, that the statutes of Jeofails shall be extended to them. In the case of *Wilks v. Rich* (c), which was, Covenant not to act after such a day; and in alledging the breach it was laid, that he acted *posthac*; to which there was a demurrer; and after argument thereon the Court gave the plaintiff leave to amend. *The Malmesbury Case* (d) was an information in the nature of a *quo warranto* against that corporation, and a mistake in the name of the corporation was pleaded in abatement, and that was rectified on a motion to amend. In *Foot v. Prouse* (e), a mistake in the defendant's name was set right after a plea in abatement. In *Collins v. Cole* (f) there was an amendment in a joinder in demurrer after a writ of error brought in the exchequer-chamber. So also in the case of *Beacroft v. The Hundred of Burnham Stone* (g), in which a very material case is cited.

MR. BOOTLE senior. The case of *The King v. Hughes* (b) was an information in the nature of a *quo warranto* against the Mayor of Liverpool; the defendant's plea stated the charter, which required the election of the mayor to be by the mayor, bailiffs, and burgeses, and to be sworn before the late mayor and bailiffs; then the plea set out, that he was sworn before such a one mayor, and two other persons then bailiffs; but the Christian name of one of the bailiffs was mistaken, *Peter* for *Robert*, which would certainly have been a fatal variance at the trial, and the information was at issue, and carried down to trial; and upon debating this matter by Counsel on both sides, before LORD RAYMOND at his chambers, he gave leave to amend.

MR. STRANGE. Nothing is more common than after demurrer and joinder in demurrer to give leave to amend a *general memorandum*, where it appears that the cause of action is subsequent to the time of the action brought. *Russel v. Martin* (i) and *Russel v. Thorpe* (k). So

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v. HAYES.
ELEANOR.

(a) 3. Cro. 144.

(b) Hilary Term, 1. Geo. 2. 1. Bar.

K. B. 142.

(c) Mich. Term, 6. *Anne*, 11. Mod.

133.

(d) Easter Term, 9. *Anne*, 8. Mod.

55.

(e) 1. Str. 625. *Annally's Rep.* 44.

3. Brown. P. C. 167.

(f) Mich. Term, 10. *Anne*.

(g) 3. Lev. 347.

(h)

(i) 1. Str. 583.

(k) Easter Term, 10. Geo. 1.

THE KING
against
ELLIAMS.

when records of *nisi prius* are made up, and the cause carried down to trial. *Duchess of Marlborough v. Widmore* (a). *The King v. Charlesworth* (b) was an indictment for forging a warrant of attorney to confess a judgment, and leave was given to amend a mistake in the warrant on the day of trial, though that was the ground of the charge. In *Crockett v. Jones* (c), the statute of Limitations was pleaded in *assumpsit*; and the plaintiff replied, *quod actio incepta fuit tali die* within the six years; to this there was a demurrer; and after the Court, upon argument thereon, had given their opinion that they ought to have shewn that the action was continued down, and have set forth the continuances, the Court gave leave to make that amendment. *Show. 273. 29. Easter, 3. Geo. 2. Dunmold v. Aldworth*.

MR. BOOTLE junior. In *Ball v. Harper* (d), the plea concluded to the country, which ought to have been with an averment; and after demurrer thereto it was amended.

MR. PARKER on the other side cited *Hatton v. Walker* (e), where, in the conclusion of the plea, it was said, "*sed actionem*" instead of "*si actionem suam habere debeat*," and to this a demurrer, and this mistake assigned for cause, and upon motion to amend, the Court would not grant it; but being afterwards satisfied that the draft of Counsel was right, and that this was only an error in transcribing, the amendment indeed was allowed, upon the authority of *Brownjohn v. Deily* (f), where, in replevin and avowry for rent, the distress was laid to be prior to the time the rent became due; and after demurrer and a *concilium* thereon, the draft of the Counsel appearing to be right, the Court gave leave to amend.

LORD HARDWICKE, *Chief Justice*. It appears by the words of the 9. *Anne*, that trials on informations of this kind are to be had in the most expeditious manner, as they are brought to try the right to offices determinable in a year or other short time; and therefore any attempts to prolong the time of trial must meet with no encouragement. It would be proper that some satisfaction should be given to the Court, by affidavit, that nothing of that kind is intended here, but that it was a mistake only in the persons concerned in drawing the plea; but it would be irregular to read any affidavit of that kind on shewing cause, as the present case is.

The rule was discharged, with liberty given to make an original motion for amending another time.

(a) Trinity Term 1730. Fitzgib. 193.
S. C. 1. Bar. 408. 418. S. C. Sayer, 97.
235. S. C. 2. Strange, 890.

(b) 2. Stra. 871.

(c) Easter Term, 12. Geo. 1. 2. Ld.
Ray. 1441. S. C. 2. Stia. 734.

(d) Hilary Term, 12. Geo. 1.

(e) Mich. Term, 3. Geo. 2. 1. Bar.
K. B. 213. 220. S. C. 2. Stra. 846.

(f) Hilary Term, 8. Anne.

TRINITY TERM,
The Seventh of George the Second,

IN

The King's Bench.

Philip Lord Hardwicke, *Chief Justice.*

Sir Francis Page, *Knt.*

Sir Edmund Probyn, *Knt.*

William Lee, *Esq.*

John Willes, *Esq. Attorney General.*

Dudley Ryder, *Esq. Solicitor General.*

} *Justices.*

The King against Ellams.

Case 246.

UPON shewing cause on another rule why this amendment should not be made, it appeared, by affidavits on the defendant's part, that in this mistake there was no affectation of delay, but that it was occasioned merely by inadvertency and the hurry of business which the Counsel who perused it were then in (a); and to obviate an objection, that the loss of a trial in this case was a reason why this amendment should not be allowed, it appeared, that an issue was taken on one fact charged in the plea, and carried down to trial, and the array there quashed by the defendant, the *verdict* being directed to, and the jury returned by, one who was a freeman of *Chester*; and that had issue been joined on the other fact to which the demurrer was, that would have met with the same fate, as it was liable to the same objection.

Some of the cases cited against the amendment were, *Poph.* 128. 144. *Syd.* 55. *E contra*, 1. *Vent.* 221. 2. *Saund.* 401. *Cro. Car.* 147.

LORD HARDWICKE, *Chief Justice.* This amendment must be grounded at common law, no provision being made for any such amendment by statute. The practice of the Court is much altered in this respect. Antiently no amendment was suffered after entry on record. The common form of saying on such motions, "all is on paper," is a proof of it; and the cases of amendments are not reducible to the general rules laid down. For, FIRST, It is said there must be something to amend by; but that rule holds not in amendments before judgment, however it may after; and there are many cases to the contrary; which have been cited on this occasion.

(a) See the case of *Rex v. Armstrong*, *And.* 109.

Q 2

SECONDLY,

THE KING
against
ELLANS.

SECONDLY, It is said, errors in law are not amendable, but only misprisions of clerks ; but it is clearly otherwise. 2. Saund. 401. 2. Vent. 221. 2. Mod. 167. In *Moslyn v. Totty*, 3. Geo. 1. in the exchequer, which was an action for a nuisance ; to which there was a demurrer to the declaration, and joinder in demurrer ; leave was given to withdraw the demurrer, and to plead the general issue.

THIRDLY, Amendments are said to be allowable only where no trial has been lost ; but I know no case where that has been laid down. A great number of amendments have been made after arguments on demurrer, where trials must generally have been lost.

FOURTHLY, It is said, that some extraordinary amendments have been allowed, but that has been where the party would otherwise be deprived of his action and lose his right ; as in the case of the *Duchess of Marlborough v. Widmore* on the statute of Limitations, and the case cited in 3. Lev. 347. which was an action on the statute of HUE AND CRY, which must be brought within a year after the robbery ; but surely the loss of an office is of as great consequence, and deserves as much favour.

It is said, that this is a criminal suit ; but I cannot say it is such ; it seems indeed to be so in respect of the fine which must be set on the conviction, but then in other respects it is merely civil ; a relator is to be appointed by statute ; costs are to be paid ; and a method is directed for the trial of a right ; and seems not to differ from trespass, where the defendant is fined.

But supposing it to be a criminal suit, that would make no difference in amendments at common law ; there is no distinction between one and the other ; that difference is founded merely on the statute of Amendments and Jeofails, by the words *plaintiff and defendant*, and has therefore been confined to civil suits. The question then is reduced to this point, Whether this case is under such circumstances as may induce the Court to exercise their discretion in ordering this amendment to be made ? No trial appears here to have been lost, for the contrary appears on affidavits. I was very doubtful of granting this amendment until satisfaction was given to the Court that no delay was intended in the case ; which matter is now sufficiently cleared up. Issue in this case might have been joined on the plea, and if a verdict had been given for the defendant, advantage might have been had of this mistake by writ of error ; for though in indictments it is necessary to give the attorney-general some satisfaction of a probable error, in order to obtain his fiat for the allowance of the writ of error, yet it is not so where a right is concerned, as in the present case.

The other Judges concurred *in omnibus*.

But LEE, Justice, said, he was at first a little in doubt on the distinction taken by HOLT, Chief Justice, in *Salk*. 50. ; but said, that rule will not hold, as appears by several authorities. The anonymous case in 2. Mod. 167. is expressly otherwise.

The rule for the amendment was made absolute.

Colonel.

Colonel Pitt's Case.

Case 247.

IN *Easter Term* last, SERJEANT DARNELL moved to discharge the defendant out of execution, upon affidavit that he was a member of the late parliament, and verified that fact by producing the return to parliament, which was dissolved on the eighteenth of *April*, and the defendant taken in execution on the twentieth. It was insisted, that his privilege entitled him to a reasonable time *eundo et redeundo*, and that two days cannot be looked upon as such; and cited 2. *Lev.* 72. Upon this a rule was granted to shew cause.

And the same Term, upon shewing cause, the case was opened thus:

Colonel Pitt being in custody at the suit of several persons who had actions depending against him in the common pleas, was removed by *habeas corpus* into the king's bench prison at the suit of several persons in actions brought in the king's bench against him, and there charged by many of his creditors with declarations, who now opposed his discharge.

MR. GAPPER for one of the plaintiffs, who had delivered a declaration to him in custody, insisted, that this method of application for his discharge was improper, for he ought to proceed by writ of privilege, as in *Dyer*, 59. b.; that the defendant, by removing himself by *habeas corpus* into this court, had thereby waived his privilege, if he had any, and might now be charged in custody.

MR. WYNNE for another plaintiff. The principal case in 2. *Lev.* 72. relates only to peers. The privilege of members during the parliament cannot be denied. All the Books are, "*durante parlamento*" or "*durante sessione (a)*." In 4. *Inst.* 46. there is an instance of wages allowed for no more than twenty-one days in the whole, "*pro expensis suis veniendo ad parlamentum ibidem morando, &c. exinde ad propria redeundo.*" Sir Thomas Thorpe (b), though speaker, was taken in execution during a prorogation of parliament, and could not obtain his discharge when the parliament met again, but the House chose another speaker. The removal of himself by *habeas corpus* is a waiver of his privilege (c). But however, if this privilege be allowable, yet it is no otherwise so than by pleading (d).

MR. BINNEY for another creditor cited *Crompton* (e) and *Coke* (f), to shew, that privilege continued no longer than during parliament. He insisted, that the defendant had particularly waived his privilege in this case, he having desired his creditor to charge him in custody with a declaration, and told him it would be for the advantage of them both; which was verified by affidavit.

(a) *Dyer*, 60. 4. *Inst.* 48. Bro. Abr. "Privilege," 56.

(b) Hackwell's *Modus Tenendi Parliamentum*, 63. 208.

(c) *Dyer*, 33. Bro. Abr. "Privilege," 25.

(d) *Dyer*, 60. Latch, 48.

(e) *Crompton's Jurisdiction of Courts*, page 11.

(f) 4. *Inst.* 24.

If a member of parliament be arrested two days after the dissolution of parliament, the court of king's bench will discharge him on motion, without filing common bail.

S. C. 2. Strz.

985.

S. C. Comx.

444.

S. C. Fort. 159.

342.

S. C. B. R. H.

28. 37.

S. C. 2. Barn.

K. B. 422. 433.

448.

S. C. Cun. Rep.

16.

1. Black. Com.

165, 166.

COLONEL
PITT'S CASE.

MR. DENNISON *for another*. Privilege in this case ought to have been pleaded, and a writ of privilege annexed to his plea (a). A lord of parliament must plead his privilege (b).

CHAPPLE, *Serjeant, on the other side*. Privilege of members of parliament is a prescriptive right (c), and it never was doubted as to arrests on *mesne process*, whatever it might be in case of an execution (d). The statute 1. Jac. 1. c. 13. supposes members liable to be discharged out of execution in right of their privilege, and subjects them to be taken in execution when that ceases. In *Thorpe's Case* (e), the time of privilege might be out, for anything that appears to the contrary. In 1. Brownl. 91. no objection there taken is to the allowance of forty days privilege before and after, &c. The statute 6. Hen. 8. 16. requires the attendance of members to the end of the parliament, and time therefore ought to be allowed after the dissolution of it for returning to their respective habitations. The law of parliament is part of the law of the land, and must be observed in all courts (f). This is a proper method of application without pleading the privilege, and not unlike the discharge upon motion of a person arrested upon *Sunday*; if no advantage can be taken but by pleading, the party may be deprived, in many instances, of that benefit for a long time.

MR. STRANGE *for the defendant*. Some things may be left out of the case; as that the defendant advised one of the parties to charge him with a declaration; that being immaterial, it not being in the defendant's power to waive his privilege, if he is really entitled to it, as every member of the house and the public is interested in it. It is said, he was only charged in custody at the suit of these plaintiffs, and not arrested originally by them, and therefore as to those suits his privilege will be no protection; but surely if the original arrest was wrong and illegal, whatever is done in consequence of that must fail too. It has not been made out to the Court, that the defendant removed himself by *habeas corpus*; it might be at the suit of some of his creditors; and if so, there is no pretence to say that he has done anything which amounts to a waiver of his privilege. The principal points are two: THE FIRST, Whether the defendant be entitled to his privilege? THE SECOND, Whether this be a proper method of claiming it? It is said, that privilege determines with the dissolution of the parliament; but it is plain privilege has always been; and as prorogations are not very antient, it being usual formerly to have frequent new parliaments, sometimes two or three in a year, such privilege must be supposed to subsist after the dissolution of them. The words "*ad propria redeundo*," in 4. Inst. 46 are very material, as it supposes them to be in the service of the public until they are returned home. So PEERS are empowered by CHARTA DE FORESTA *eundo et redeundo* to kill two or three deer in the

(a) 1. Sid. 42. 1. Keb. 3. 13.

(b) Sid. 29. Vidgen's Ent. 93.

(c) Dyer, 60.

(d) Moor, 57. Salk. 150.

(e) Moor, 340.

(f) Salk. 509.

king's forest. I do not find any authority where it is settled that four days is the time allowed for privilege; but that a reasonable time is, appears from many books relating to parliament (a). A witness is privileged *redeundo* (b); the same reason holds in the case of a member, &c. I know of no precedent of a discharge of a member on motion; but as the whole fact, as to his being a member, the time of the dissolution of parliament, and of his being taken, is now disclosed to the Court, and admitted to be true, there can be no occasion for putting the party to the necessity of pleading this privilege; and this method of proceeding is agreeable to the practice of the Court in many instances.

COLONEL
PITT'S CASE.

LORD HARDWICKE, *Chief Justice*. There can be no doubt but a member may waive his privilege under his hand, or by submitting to any actions or proceedings therein; and in such cases THE HOUSE will not suffer him to resume his privilege, unless the service of THE HOUSE requires his assistance. I desire, therefore, that it may be laid before the Court, whether the *habeas corpus* was procured at the defendant's instance or at the instance of any of his creditors.

This case was adjourned for the purpose of affording the Court an opportunity of consulting the rest of the Judges on the subject; it being thought a matter of the first moment, not merely to the defendant in particular, but to the kingdom in general.

At another day, LORD HARDWICKE, *Chief Justice*, said, this case had been argued before ALL THE JUDGES IN ENGLAND, except BARON CARTER, at *Serjeants Inn*, as a matter of consequence to the rights and privileges of parliament on the one hand, and on the other to the property of honest creditors. AND WE ARE UNANIMOUS IN OPINION, that members of parliament are privileged *undo et redeundo*; for what time they are so privileged it is not necessary for us to determine, it appearing that *Colonel Pitt* was taken no more than two days after the parliament was up, which we think cannot be a convenient time. THE GREAT QUESTION will be, Whether advantage can be taken of this privilege on motion? or, Whether it is not necessary to be on record by writ of privilege under the Great Seal? WE ALL AGREE, that a writ of privilege is proper; and whether the other way is not so too, there is some difference of opinion amongst us. There has been no authority cited of any such discharge on motion (c).

Let the rule be enlarged until next Term, with liberty to the defendant to bring his *writ of privilege*. If he insists on proceeding in the present application, he shall have our opinion upon the matter next Term.

(a) Elsing's *Antient Method and Power and Privilege of Parliaments. Manner of Holding of Parliaments*, 2d part, 103. Sir Thomas Shirley's Case; and in the same Book, 108. Mr. Martin's Case. Another Book, called, *The Opinions of Sundry Learned Counsel*, DODDRIIDGE, &c. concerning the

In the Preface to that Book, wrote by DODDRIIDGE, it appears there is such privilege.

(b) Stiles, 395. 1. Vent. 11.

(c) See Chester v. Updale, 1. Will.

COLONEL
PITT'S CASE.

In the present *Trinity Term*, the defendant having applied to the court of chancery for a *writ of privilege*, and some difficulties arising there for want of sufficient notice to his several creditors at whose suit he was in custody, and THE CHANCELLOR and THE MASTER OF THE ROLLS, who assisted on that occasion, not seeming to think very favourably of the application there, he now resorted to the court of king's bench for their opinion, as the case stood on the former proceedings.

LORD HARDWICKE, *Chief Justice*, now delivered the resolution of ALL THE JUDGES OF ENGLAND to the effect following: After having stated the fact, and repeated the former resolution, he said, all the Judges had met again, except DENTON, *Justice*, who was ill, but had certified his opinion by MR. JUSTICE LEE, and that ten of them were of opinion that the defendant was entitled to his discharge on *motion*; that REYNOLDS, *Chief Baron*, doubted; and that BARON THOMPSON was inclined to think he could not be discharged on motion, though he did not give any positive opinion.

There are two considerations in this case: FIRST, How the law stood as to the matter before the statute of 13. *Will. 3. c. 3.* SECONDLY, Whether that act has made any alteration.

As to THE FIRST, all the Judges are of opinion, that before that act the regular way was to proceed by *writ of privilege* under THE GREAT SEAL for the discharge of any member of parliament by any of the courts of *Westminster-Hall*, not entering into any enquiry as to the discharge of any member by the house of commons itself sitting the parliament. This writ of privilege was a *superfedeas* to the action, and was so pleaded, the conclusion being always, *si in placito prædicto ulterius procedere vel cognoscere velit aut debeat*, as appears by *Prynne's Register of Parliamentary Writs*, lib. 1. fo. 660.

As to THE SECOND POINT, ten of the Judges are of opinion, that two alterations are made by the act: FIRST, That it has taken away the old plea of privilege: SECONDLY, That it has made the execution of the process on any member irregular and illegal.

As to THE FIRST, The act is entitled, "An act for preventing any inconvenience that may happen by privilege of parliament." The first clause of the act impowers any creditors to bring actions against any member, &c. immediately after any prorogation or dissolution of parliament, or after an adjournment for fourteen days. This clause is in abridgment of the privilege of parliament as it stood before this act. Then comes a proviso only privileging the persons of members from arrest during the time of parliament; and then follows the enacting clause, which gives a remedy of proceeding against members by summons and distress infinite, &c. after prorogation, &c. which concludes with these negative words, "shall not arrest"

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PITT'S CASE.

"arrest or imprison the body, &c." The provision, therefore, made by this act is, that after a prorogation, &c. a member may be proceeded against during the time of privilege; the effect of which is, that a member cannot now plead his privilege to the action, that being taken away by the act. To what then can he plead it, not to the *latitat, capias*, &c. by which he is taken, in avoidance of such process. I know no instance where such plea is allowable, unless it be expressly given by act of parliament, as in the case of the Insolvent Debtors Act, and in the case of *Widdrington v. Charlton* (a), where in an appeal it was held by LORD PARKER, where a man is brought in by erroneous process, or one process mistaken for another, that matter is not pleadable in avoidance of the process. If *Mr. Pitt*, then, is entitled to his privilege from arrests, and cannot plead as before the act, what other remedy can he have than by motion? and that the more strongly here, because the statute of the 13. *Will. 3. c. 3.* has made this arrest of his person irregular. Two things are done by this act: FIRST, It has instituted a new method of proceeding, either by summons or distress infinite, or by original bill and summons, attachment, and distress infinite. SECONDLY, It has provided expressly against the arrest of his person; so that now this privilege from arrests is become part of a public act of parliament, which we are obliged to take notice of; and it need not to be certified to us by plea, as before the act, being then of a private nature only; though indeed now we cannot take notice of the person's being a member of parliament but by matter of record, which has in this case appeared to us by *Mr. Pitt's* return to parliament, which is the proper method, as appears by *Sir Richard Temple's Case* (b). And this discharge on motion is no new thing, as appears by *Lady Huntingdon's Case* (c), which was before the act, and yet privilege of peerage as properly pleadable as this privilege, and by *Lord Banbury's Case* (d). I have a good manuscript report of that case, where it is said, by HOLT, *Chief Justice*, that if it had appeared he had been summoned to parliament, and there was no dispute as to the identity of the person, he should have been for discharging him upon motion. And *Lord Mordington's Case* (e), in the common pleas, when LORD KING presided there; where *Lord Mordington* being a *Scotch* peer, who are all since the Union entitled to the privilege of peerage, though not members of the house of peers, was discharged from an arrest, and the bailiff compelled to make his submission. This therefore brings it to the common case of an arrest of a person who ought not to have been arrested. Persons arrested on a *Sunday*, contrary to the 29. *Car. 2.* are discharged on motion. The case of ambassadors servants, under 7. *Anne*, is the same. So in the case of any irregularity in the service of process under the statute for preventing frivolous, &c. So that we think this discharge of *Mr. Pitt* proper, by force of those negative words in the 13. *Will. 3.* AND WE HOLD it likewise to be a matter of dis-

(a) Hilary Term, 11. *Anne*.

(c) 1. Vent.

(b) Sid. 42. Ray. 12.—This case is also to be found in 1. Keble, 3. 13. 16.

(d) Salk. 512.

(e) Fort. 165.

COLDRELL
PITT'S CASE.

cretion, in the Court, whether they will relieve on motion or pleading in case of privilege. There are similar cases to the present, the arrest of a juror, a witness, or a party attending his own suit; for that privilege is the privilege of the court on which they attend. Antiently writs of privilege were sued out, as appears by *Rassal, tit. "Privilege;"* and though that is a proper method, yet the constant practice now is to discharge on motion, and that discharge too as well by the Court out of which the process issued as by the Court that the juror, &c. was attending; as was done in the case of *Hatch v. Blisset (a)*: Mrs. Blisset the defendant having been arrested in her return to *Portsmouth* from *Winchester*, where she had been attending a cause of her own, the court of king's bench, out of which the process issued, discharged her on motion the next Term, and judicially took notice of the privilege belonging to the court of *Nisi Prius*.

The defendant was accordingly discharged.

(a) Trinity Term, 13. Anne. Gilbert, 308.

Case 248.

Colmer against Clark.

A bond restraining the obligor from carrying on his trade in a particular place and for a limited time is good.

Cro. Eliz. 872.
Show. 2.
Espin. "Debr,"
183.

WRIT OF ERROR on a judgment in the common pleas for the plaintiff there, on demurrer to the declaration, which set forth, that in consideration the plaintiff, who was a *tally-man*, would take the defendant into his family, and instruct him in the trade, with a provision of meat, &c. and an allowance of twenty pounds wages a-year, the defendant promised to serve him for five years, and not to exercise the trade himself for seven years after that time within the city and liberty of *Westminster* and bills of mortality, which agreement was by articles under hand and seal. The breach assigned was, the exercise of the trade within, &c.

The court of common pleas held the agreement good, and agreeable to the rules of law, the restraint from the exercise of trade being confined to a particular district, and founded on a valuable consideration.

Nobody appearing in the king's bench for the plaintiff in error, the judgment was affirmed.

The cases cited for the defendant in error by MR. BICKNELL were, the case of *Cheeseman v. Nameby (a)*, about eight years ago, where this point was solemnly determined in the common pleas, which judgment was affirmed on a writ of error in the king's bench, and afterwards in the house of peers; and the case of *Mitchell v. Reynolds*, in LORD PARKER's time, on the same point (b).

(a) *Cheeseman v. Rainby*, Fort. 297.
S. C. 2. Sup. 739.

(b) 10. Mod. 27. 85. 130. Fort.
236. 1. Peer. Wms. 181.

Tryon against Carter.

Case 249

WRIT OF ERROR on a judgment for the plaintiff in the common pleas in debt on a bond. On *oyer* of the condition it appeared, that the money was made payable the fifth of *December*, and payment was pleaded on that day. The plaintiff replied, it was not paid on that day, and issue was joined thereon, and a verdict for the plaintiff, finding that the defendant did not pay it on the twenty-fifth of *December*, as is alledged in the replication.

MR. PARKER, *for the plaintiff in error*, insisted, that this was ill, the day of payment being made part of the issue. This is a negative pregnant (a). Payment before the day could not have been given in evidence on this special issue, though it might on a general *solvit ad diem*. Besides, the verdict finds that he did not pay on the twenty-fifth, which is entirely immaterial.

MR. STRANGE *on the other side*. As to the objection to the verdict, that defect is supplied by the subsequent words. It is found, that he did not pay on the twenty-fifth of *December*, as is alledged in the replication; there is no such allegation before as payment on the twenty-fifth, but on the fifth; that therefore must be rejected, and then it will be good. Supposing then the verdict and issue consistent, then this is no more than payment at the day pleaded, and payment before might as well be given in evidence on this issue as the other.

LORD HARDWICKE, *Chief Justice*. The objection taken to the verdict is properly answered. The cases cited for the plaintiff in error are, where the time at which the parties title accrued is restrained to a particular day, and that certainly is ill. But in the case of a bond conditioned for the payment at a certain day, there can properly be no legal performance of the condition but by payment at the day. Payment before the day may indeed be given in evidence on *solvit ad diem*, but that goes upon this reason, that the money is looked upon as a deposit in the hands of the obligee until the day comes, and then it is actual payment. Payment before the day might well have been given in evidence on this issue.

It was then observed by MR. PARKER, that the condition is for the payment of the money and interest on or before the fifth of *December*.

HARDWICKE, *Chief Justice*, thought this would make a very material difference, because, in such case, there might have been a legal performance of the condition, by payment, at any time before; and that this would bring it to the case where issue is taken on a plea of payment at a time before that which is limited by the condition for payment, which is certainly an immaterial issue, if found against the pleader.

To debt on bond, payable 5th *December*, the defendant pleaded payment on *that day*; replication non-payment on *that day*; and the verdict finds non-payment on the 25th *December*, and a replender awarded.

S. C. 2. Stra. 994.
S. C. Cun. 71.
106.
S. C. cited 1.
Burr. 302.

(a) Cro. Jac. 202. Yelv. 122. 2. Mod. 183, 184.

TRYON
against
CARTER.

MR. STRANGE. The defendant, by pleading payment on the fifth of *December*, admits no payment was made before that time.

LORD HARDWICKE, *Chief Justice*. The plaintiff must make out his own case, and shew a breach of the condition, without the aid of the defendant's plea.

LEE, *Justice*, was of opinion, that non-payment before the fifth of *December* was admitted by the plea, and that is an answer to the objection.

Adjournatur.

Case 250.

The King against Pritchard.

"Justices of our
"county-pala-
"tine of *Lan-*
"caster," and
"justices at
"Lancaster,"
shall be intended
to mean the
same persons.
S. C. Cun. 77.

A VERDICT having been obtained against the defendant at the assizes at *Lancaster*, in an information in the nature of a *quo warranto* to enquire by what right he held the office of bailiff of *Liverpool*, amongst many other exceptions taken in arrest of judgment these three were much insisted on:

THE FIRST was, That the *mittimus* is directed "to the justices of our county-palatine of *Lancaster*," and in the *poslea* they are only named "justices at *Lancaster*;" so that the commission does not appear to be executed by the persons to whom it was directed; for "justices at *Lancaster*" may mean justices of the peace there.

THE SECOND was, That one *William Hill* is returned in the panel annexed to the *venire*, and in the *habeas corpora* he is named *William Kell*.

THE THIRD was, That this being a special jury, their names ought to have been inserted in the body of the *habeas corpora*, and not on a panel annexed, according to the late *Jury Act*, the case of special juries and trials at bar being excepted out of that act; and therefore the antient method, of inserting their names in the *habeas corpora*, should have been observed.

At another day, on shewing cause, it was insisted,

As to THE FIRST OBJECTION, that it is the established practice and usage of those courts to describe the justices in this manner; and many precedents to this purpose were laid before the Court, that justices of peace could not be intended here, the description of their commission being very different.

Naming a juror
Hill in the panel,
and *Kell* in the
habeas corpora,
is immaterial.

As to THE SECOND OBJECTION, An affidavit was read that *Hill* was the person struck by the Master, and his name mistaken only in the *habeas corpora*; that it comes to the common case where twenty-three jurors only are returned; which is not fatal, especially here, it appearing that he was not one of the persons who tried the information (a). The defect, if any, is aided by the 18. *Eliz.* c. 13. and the 21. *Jac.* 1. c. 13. as it is made amendable.

(a) Cro. Eliz. 586. Cro. Jac. 647. Cro. Car. 223. 5 Rep. 37. 42.

As to THE THIRD OBJECTION it is said, that it did not appear upon record that there was a special jury; for though the title of the panel annexed to the *habeas corpora* is, "the names of the special jurors returned," yet that by no means implies any such thing, it may be construed only such particular persons; and if it be not to be taken as a special jury, then it being only a want of a sufficient number of jurors is within the resolution of *Gardiner's Case*, 5. Co.

In the record of an information *quo warranto*, it is sufficient if the names of the special jurors are inserted in the panel, and annexed to the *habeas corpora*.

LORD HARDWICKE, *Chief Justice*. We must presume "justices of our county-palatine of Lancaster" and "justices at Lancaster" to be the same persons. These are superior courts, and we take notice of their stile. This is the same as "our justices at Westminster." But laying that out of the case, we are bound by the precedents in the *Bewdley Case* (a); there, though the act required the jury to be returned *de corpore comitatûs*, and the practice having been to return them *de vicineta*, the Court would not break into such an established rule and usage, but held it well, in contradiction to the act, to avoid the general ill consequence which would have attended a contrary resolution.

AS TO THE SECOND OBJECTION, If there is any occasion for an amendment under the statute 21. Jac. 1. c. 13. it must be in the court where the process issued, not here; but this case is not within that act, the words there being, "the names of the jurymen who tried the cause." *Hill* is not one of them here; and this shews the sense of the Legislature, that there is no occasion for amendment of the names of any jurors who did not try the cause. This comes clearly within *Gardiner's Case*. The second objection, therefore, is of no weight, because *Hill* was not one of the jurymen who tried the cause.

THE THIRD OBJECTION may be considered two ways:

FIRST, Whether this is to be taken to be a special jury by virtue of the words "the names of the special jurors returned." Special jury before the late statute was no legal term; since the statute, indeed, it is a term of law; taking it, therefore, to be a special jury, this must be a *habeas corpora* at common law, the cases of special juries being excepted out of the act. The question then is, Whether this is good after verdict? Original writs are tied up to certain forms in the *Register*; in judicial writs it is otherwise. There is no material difference between inserting the jurors names in the body of the writ, and annexing a panel of their names to the writ. Supposing it, however, a defect in form, it is aided by the 18. Eliz. c. 13. the statute 9. Anne, c. 20. extending that act to informations of this kind.

SECONDLY, Taking these words "the names of the special jurors returned" not to be a sufficient foundation for us to construe this a special jury, then it comes to the case of a less number returned than ought to be; and for anything that appears to the contrary, that may be by the direction of the Judge, in pursuance of the power given him by the statute.

(a) 1. Peer. Wms. 207. 2. Ld. Raym. 1359.

THE KING
against
FRITCHARD.

PAGE, *Justice*. The reason why the mistake of a juror's name in a *habeas corpora* is bad is, because one being sworn who ought not, the trial is by eleven jurors only. And he inclined to think, the omission in not inserting the jurors names in the *habeas corpora* is form only, and aided by the 18. *Elix.* c. 13.

PROBYN, *Justice*. The justices of counties-palatine are under two commissions: One under the great seal in the trials of causes which are sent down from the courts of *Westminster-Hall* by *mittimus*; and the other under the seal of the county-palatine for causes arising within the county-palatine, and tried there in bank. The description of the justices acting in either of those capacities is the same, and there is no room to presume there are any other. The *habeas corpora* is the act of the Court; the return of the panel the act of the sheriff. If the panel was annexed at the time of sealing the writ, the panel might be taken as part of the writ, which I think cannot be, as the annexing it is the act of the sheriff.

LORD HARDWICKE, *Chief Justice*. The writ takes notice of, and refers to the panel, and seems to be part of the writ.

PROBYN, *Justice*. As this power of the Judge of ordering a fewer number of jurors than forty-eight comes in by way of exception to the general provision of the act, the execution of that power ought to appear on record.

LEE, *Justice*. I doubt whether this third exception is proper on motion in arrest of judgment. It is true, it appears by the record that less than forty-eight are returned, but that possibly was by the order of the Judge, and then there is no ground for the objection; this therefore is only proper to be enquired into on a motion for a new trial, where the facts will be laid before the Court. The words "special jurors" are no warrant at all for raising a presumption of a special jury in this case. If taken as a special jury, the annexing the panel of the jurors names to the *habeas corpora*, instead of inserting them in the body of the writ, seems to be a defect in form only.

LORD HARDWICKE, *Chief Justice*. If the words "special jurors" do not amount to a special jury, then, indeed, the objection is improper here; but it should be on motion for a new trial. The order of the Judge, &c. cannot appear on the record; but it is matter of regularity or irregularity only, and to be inquired into that way.

Adjourned, and on the last day of the Term the rule was discharged.

Case 251.

The King against Penelope Smith.

THE return to a *habeas corpus* cannot be supplied by affidavit. **A**N *HABEAS CORPUS* was issued to bring up the body of one James Smith, an infant between thirteen and fourteen years old, who was in the custody of his aunt, and a general *paratum habeo*

babeo was returned, without specifying any reason in the return for keeping him from his father; but that was supplied by *affidavits*, though of little or no consequence.

THE KING
against
PENELOPE
SMITH.

HARDWICKE, *Chief Justice*, objected to this practice as irregular, in supplying, by *affidavits*, what ought to have appeared on the return.

MR. BICKNELL then moved, on the behalf of the father, to have the child delivered over to him, as the person by law intitled to the care and custody of him. In the case of *The King v. Johnson* (a), upon a dispute between the guardian of an infant of the age of nine years, appointed by the father's will, and a curator appointed by the spiritual court, the child being brought into court on the return to a *babeas corpus*, the Court took the child out of the hands of the curator, and delivered him over to the guardian (b).

On a *babeas corpus* to free the body of an infant from the custody of his aunt, the Court will not determine the right of guardianship, but will merely set the child at liberty.

On the other side was cited *Sir Robert Viner's Case* (c).

LORD HARDWICKE, *Chief Justice*. There being no justification returned for detaining this child, he must certainly be left to his liberty as to his continuance with his aunt; but the question is, Whether the Court ought to go farther, and deliver him over to his father? I think we cannot. The only intent of a *babeas corpus* is to provide against any restraint of the party's liberty. In the case in *Viner's Case* no more was done than to set the party at large. So in *Lady Catherine Annesley's Case*, who being brought up by *babeas corpus*, the Court would make no order for delivering her over to the *Duchess of Buckingham*, her mother, though she had the same right of guardianship to the child as here, the father in that case being dead. The case of *The King v. Johnson* is the only case I have heard of to the contrary; and I do not see how that can be right. How can we, on motion, try the right of guardianship? for that would be the consequence, which would disable the party from taking the opinion of a superior court by writ of error. I do not know but that the father may take the child wherever he finds him; however, he has his remedy against any person who detains him illegally. He may bring his writ of ravishment of ward. There is an action too in which the guardianship itself is recoverable, the writ *de ejectione custodiæ*. At this rate we are to do two acts upon this *babeas corpus*, not only to discharge him from the custody of the first person, but likewise to commit him to the custody of another. Where a person is removed into this court by *babeas corpus*, we commit him to the custody of THE MARSHAL; but in case of removal from one prison to another, there must be one *babeas corpus ad deliberand.* and another *ad recipiend.*

S. C. 2. Stra.
982.
S. C. Cun. 72.

The other Judges concurred (d).

(a) 1. Stra. 579. S. C. 8. Mod. 214.

(c) 2. Lev. 128.

(b) See what is said by PEMBERTON, *Chief Justice*, in the case of *Lady Harriet Berkeley*, 3. Co. 39. 3. State Trials.

(d) See *Rex v. Mead*, 1. Burr. 542. *Rex v. Sir Francis Blake Delaval*, 3. Burr. 1434.

THE KING
against
PENKLOPE
SMITH.

LEE, *Justice*, said, the case of *The King v. Johnson* was ruled as cited at the Bar ; but he said, LORD RAYMOND, who was then one of the Judges, told him, that upon consideration he thought the Court did wrong in that case.

Case 252.

Ruffen against Coleby.

If A. covenant to pay seamen their wages yearly, and B. "in consideration thereof," covenant to pay A. 42l. every month, these are mutual covenants.

1. Mod. 64.

2. Mod. 33.

2. Saund. 155.

1. Stra. 535.

Salk. 171.

Dougl. 665, 659.

688.

4. Term Rep.

673 761.

1. H. Bl. Rep.

270.

1. Term Rep.

165.

ACTION OF COVENANT on articles of agreement, by which the plaintiff, who was master of a vessel, covenanted to make use of the same in the coal-trade for the defendant's service ; and among other things covenanted, that, during the twelve calendar months (the time the vessel was hired for) he would pay all the seamen their wages yearly ; in consideration whereof the defendant covenanted to pay the plaintiff forty-two pounds every month during the year : the non-payment of which is the breach assigned. To this the defendant pleaded, that the plaintiff did not pay the seamen according to his covenant ; and to this plea there was a demurrer and joinder in demurrer.

MR. ROBINSON for the plaintiff insisted, that these were mutual covenants ; and that though the words are, "in consideration thereof," yet in the nature of the thing this could not be a condition precedent, for the payment of the seamen by the plaintiff is to be yearly ; of the plaintiff by the defendant *monthly* ; so that, from the manner of the covenants, it is impossible the performance of the act to be done by the plaintiff should be necessary to intitle him to an action against the defendant for not doing the act he had covenanted to do ; and he cited the case of *Thorp v. Thorp* (a), where this distinction is taken by HOLT, *Chief Justice*, in the resolution of that case.

MR. AGAR, on the other side, cited *Wyvil v. Stapleton* (b) where the plaintiff by deed covenanted to transfer to the defendant two hundred pounds *South-Sea* stock ; and the defendant, in consideration thereof, covenanted to pay therefor the sum of thirteen hundred and sixty pounds ; the breach alledged was, the non-payment of this money ; to this a trifling plea ; and demurrer thereto : and the court of common pleas was of opinion, that the tender of this stock by the plaintiff to the defendant was necessary to intitle him to his action ; and for want thereof, judgment was given for the defendant : upon a writ of error in the king's bench, that judgment was reversed, because that Court was of opinion, that they were mutual covenants, and no tender necessary ; but the judgment in the king's bench was reversed in the house of lords on this point.

LORD HARDWICKE, *Chief Justice*. There can be no condition precedent here, for the reasons given ; and the resolution in *Thorp v. Thorp* is certainly good law ; for these cases do not so much depend on the manner of penning the covenants as the nature of them. In the case of *Wyvil v. Stapleton*, the reason THE HOUSE

(a) 1. Salk. 171.

(b) 1. Stra. 615. 3. Mod. 292. 3. Brown's P. C. 89.

OF LORDS went upon was, that it would be highly unreasonable that the party should be compelled to pay his money without having the stock, which was the consideration for paying the money, transferred to him, or tendered; and that at least the payment of the money, and transfer of the stock, ought to be concomitant acts.

RUSSEN
against
COLEBY.

The other Judges concurring,

Judgment was given for the plaintiff.

Robinson against Beilby.

Cafe 253.

WRIT OF ERROR on a judgment in the common pleas in debt on a charter-party, for the penalty therein-mentioned, and several breaches assigned. To this action *nil debet* was pleaded; which the common-pleas held an ill plea upon demurrer thereto, and gave judgment for the plaintiff.

"*Nil debet*" cannot be pleaded to an action of debt on a charter-party.]

S. C. Cun. 75.
2. Ld. Ray. 1503.
Hard. 352.
3. Lev. 145.
Co. Lit. 373.
1. Salk. 234.

MR. STRANGE, for the plaintiff in error, insisted, that this action not being grounded merely on the deed, but likewise on the breach of covenant, which is matter of fact, this plea was not improper (a).

MR. DENNISON contra. The cases cited are, where debt is brought on a judgment suggesting a *devastavit*; or in the case of an escape, there the record is matter of inducement only to the action, and not the ground of it, as here. This matter was very solemnly settled in the case of *Warren v. Consett* (b): A writ of error was brought on a judgment in the common pleas in debt on a contract under hand and seal, whereby the defendant agreed to pay so much on having so many shares in the *Welch Copper Company* transferred to him; and *nil debet* was pleaded, and held ill upon the above cited distinction; and he compared it to an action of debt brought by the assignee on a bail-bond.

THE COURT were clearly of that opinion (c).

MR. STRANGE then excepted to the declaration, that one of the breaches was not sufficiently set forth.

THE COURT inclined to be of that opinion.

MR. DENNISON said, that any one breach well set out is sufficient to intitle the plaintiff to an action for the penalty, and the assignment of the several breaches is duplicity of pleading only, and matter of form, of which no advantage can now be taken, the defendant having pleaded over; but he ought to have demurred.

In debt for a penalty, one breach well assigned is sufficient.

THE COURT was of that opinion.

The judgment was affirmed.

(a) 6. Mod. 127. 1. Saund. 38.
21. Hen. 7. c. 14. f. 6.

(b) Easter Term, 1. Geo. 2. 8. Mod.
106. 323. 2. Stra. 778. 2. Ld. Ray.
1503. Prac. Reg. 306. 1. Bar. 15.

(c) See *Mills v. Bond*, Fort. 363.
Mayhew v. Mayhew, Fort. 367. Anonymous, 2. Wils. 10.

Case 254.

Hallet against Lawton.

In trespass *per quod servitium amisit*, the plaintiff shall have full costs, though the damages are under forty shillings.

THIS was AN ACTION OF TRESPASS for beating the plaintiff's servant, *per quod servitium amisit*. The jury gave a verdict for the plaintiff, but for less than forty shillings damages.

A motion was made on behalf of the plaintiff that he might have full costs, notwithstanding the damages were under forty shillings.

3. Com. Dig.
"Costs" (A. 3.).
Hullock on
Costs, 32 to 47.

AND THE COURT held, that this was not to be considered as an action of assault and battery within the statute 22. & 23. Car. 2. c. 9. but was founded on the *special damage* the plaintiff had received from the loss of service it had occasioned, and therefore he ought to have full costs; and the Court said, that the case of *Brown v. Gibbons* (a) was directly in point with the present.

(a) Ante, 129. 1. Salk. 206. 2. Ld. 371. Anderson v. Buckton, 1. Stra. Ray. 831. See also Carter v. Fish, 192. Batchelor v. Biggs, 2. Black. Rep. 1. Stra. 645. Phillips v. Fish, 8. Mod. 354. S. C. 3. Will. 319.

MICHAELMAS TERM,

The Eleventh of George the Second,

A T

Serjeants Inn Hall.

BEFORE

The Twelve Judges,

EXCEPT

Denton, *Justice.*

Sir William Ashburnham *against* George Bradshaw and Case 255,
Others.

ROBERT BRADSHAW, clerk, on the twentieth day of November, in the year 1734, duly made and executed his last will and testament; and by the said will gave and devised divers lands and tenements to trustees, and their heirs, in trust for the benefit of certain *charitable uses* therein mentioned, and several other trusts.

The statute of the 9 *Geo. 2. c. 36.* entitled "An Act to restrain the disposition of lands, whereby the same become unalienable," commenced from and after the twenty-fourth of June 1736. In July 1736 the testator died, without revoking or altering his said will.

The question was, Whether such gift or devise, so far as the same relates to the charitable uses aforesaid, should be good in law, notwithstanding the said statute, or not?

This question was referred, by the court of chancery, to the Twelve Judges for their opinion, and it was accordingly argued before them at *Serjeants Inn Hall.*

EYRES, *Serjeant, for the heir at law.* All wills are in their own nature revocable as long as the testator is living, and that not only by an express revocation, but by an act which is inconsistent

R 2

with

A devise of lands to charitable uses made antecedent to the statute of Mortmain is good, although the testator did not die until after the statute commenced.

S. C. 2. Atk. 36.
S. C. Barn. C. 6.
S. C. cited 3.

Atk. 552.
3. Atk. 551.
1. Vezey, 225.
186.

Amb. 451. 550.
2. Bl. Com. 273.

SIR WILLIAM
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with it; therefore this act of parliament which has been made, being contrary to and inconsistent with the will, must amount to a revocation of it; nor is it a new case. If a tenant in tail make a will, and then suffer a common recovery, though done in order to give himself a power of disposing, the will is at an end. If one make a will and afterward make a feoffment, though it be to the use of his last will, yet it is a revocation of it; and the present case is the same, for it being an act of parliament, the testator must be considered as a party to it, and it must be construed his own act, as in 1. Roll. Abr. 616. (K.) pl. 2. If before 29. Hen. 8. *cestui que use* had devised the use, and the statute had come after which transfers the use into possession, this would have been a revocation, for thereby the use is gone; and every man is party to an act of parliament, and of consequence the deviser was so too. As to the particular words of this statute they are, "that no manor, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever; nor any sum or sums of money, &c. shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to, or upon, any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever; unless such gift, &c." Now when is it the lands shall be said to be settled and conveyed by will? If at the time of the execution of it, then this is a case out of the statute; if not until the death of the testator, then it is clearly within it. Now that a will operates and takes effect as such at the death of the testator, is the constant doctrine of all the Books, and particularly in the case of *Butler v. Baker* (a). And for this reason it is that a devise by the husband to the wife is good, because it does not take effect until his death; therefore there can be no difficulty to say when it is that a will shall be considered as a disposition or settlement. And as to this case, had the Legislature intended to have excepted it, there would have been a clause to that purpose; but in fact there was no reason or occasion to make such a provision, for every person in England ought to be apprized of the law, and conform themselves to it. This case has been compared to the case of *Serjeant v. Puntis* (b), where a will was made before the statute 29. Car. 2. c. 3. and the testator died after, and it was held not to be within the statute. But that case is no way similar to this, for it appears by the words of the statute, that the Legislature had the time of execution solely in view, for all the circumstances required by it relate to that time, viz. the signing, sealing, and witnessing. But on the other side there is a case which seems to be in point, *Buck v. Morgan*, 1717: A papist seised in fee, by will devised his estate from his heir at law to papists; afterwards a law passed which made all conveyances of such persons, unless for valuable

(a) 3. Co. 25.

(b) Prec. in Chap. 77.

consideration,

consideration, void, and after this the testator died; the heir at law, who had conformed, brought an ejectment; and the disposition was held void unanimously by the court of exchequer in *Ireland*, and the judgment affirmed here in parliament. And among the reasons in the printed case, which appears to be signed by SIR R. POWYS and SIR R. RAYMOND, it is urged, that it could not be said to be a disposition until the testator's death; and in that case there was some colour to complain of hardship, on account of the construction made, that the act related back to the first day of the sessions, which is not contended for here. It must likewise be considered, that the title of this act is to prevent such disposition, and that it calls such disposition a mischief; and if the Legislature call it so, I must do it likewise. And if the construction contended for on the other side is to prevail, when is it that this act, made to prevent a mischief, is to take place? There may be a thousand wills extant which may have the same plea as this; besides, not only all wills really executed before the act will come within the same reason, but how easy will it be to antedate a will made since the statute.

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HOLLINGS. The law is clear that a will is no disposition until the testator's death; it is of no force until then (*a*), so that he can exercise every act after, that he could before the making; it is in its own nature so. He cannot, by any words whatsoever, bar himself of the power he has of revoking it; it is not a complete disposition, but only the inception of a disposition (*b*); it cannot speak until his death. It is for this reason that, in case of personal estate, whatever he has at the time of his death will pass, though acquired after the making of the will; upon the same foundation a devise by jointenant is void. It is considered of so little account at the time of execution, that any alteration in the capacity of the party, between that and the time of his death, will destroy it; as if he sell the lands devised and die before entry, or if he be convicted of felony (*c*). It differs indeed from the case of a *non compos*, because the law construes that to be his will which was so at the last time he had the free use of it. If a *feme sole* make her will and then marry, it is a revocation. The act of parliament takes notice of it as a present grievance and likely to grow, and it would be absurd to suppose a Legislature would apply a remedy to a present grievance, which remedy may not take effect until forty years after the making.

FENWICK. Nothing can be said to be a disposition or transfer, unless something pass out of one person and pass to another; and the act saying "no disposition shall be good," must mean that none shall take by it; and as any incapacity subsequent to a will renders it void, it is immaterial whether a deviser become inca-

(a) Swinburn, 12. Domat, 41. 284.

(b) 4 Co. 60. 2. Vern.

(c) Godolphin, 35. Year Book
39. Hen. 6. pl. 18.

SIR WILLIAM ASHBURNHAM pable by his own act, by common law, or by statute, as this case is.

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FLOYD *contra*. The question is, Whether the will is an appointment from the making of it, or from the death of the testator only? A gift by last will differs from all other gifts; no particular form of words is required nor any consideration; and is favoured much more than any other method of conveyance: now a gift, or at least an appointment how a thing shall go, may be, though no one takes benefit of it immediately. The question is not, When the devisee shall take? for the words are not "no one shall take," but "no lands shall be given," and "all gifts which shall be made, &c." so that a gift, to take effect *in futuro*, is not out of the statute. And though it is urged, that nothing can be said a gift but where something passes out of one person to another, yet surely we may abstract the time of giving, from the time of taking by virtue of that gift. Upon what other foundation does the law speak of *donatio causâ mortis*, which in *Chancery Reports*, 269. is defined to be, where one not having an opportunity to make his will, for fear he should die before he has made it, gives away his goods with his own hands (a); this, if he die, shall operate as a legacy, but if he recover, then the property thereof reverts to him: now what reverts if nothing passed? In the *same Book*, 303. a will is put on the same footing with a *donatio causâ mortis*, for that both of them are gifts *in presenti*, though to take effect *in futuro*, though not a present substantial gift, and though revocable during the parties life, and differ in nothing from one another. The words of the statute of Wills, 32. Hen. 8. are, "give, dispose, or devise," and are much the same as those in this statute. And surely, when a man has made his will, he has done every act that was necessary as to him to be done, in order to a disposing or appointment: the death of the party is no act, it adds nothing to the disposition itself, but only closes the period of time in which he had a power of altering it. The case of a real estate differs from that of a personal, for lands purchased after the making of the will will not pass by it, which shews that it relates to, and operates from the time of the making, and that the testator's death is not the time to be regarded; for if so, he had those lands then, and consequently they would pass. The statute of Wills says, "shall continue in force." What shall continue in force? That which has no force until then. If one under his age of twenty-one years devise lands, and after come to that age, and die without republishing his will, it is totally void, because void at the time of making, which is the material time to be considered. Though if one make a will, and afterward make a feoffment to the use of his last will, this is a countermand of his will, yet such countermanded will is sufficient to declare the uses of the feoffment.

(a) 2. Vezey, 431. 3. Peer. Wms. 357.

ment even in mere legal conveyances, as a bargain and sale; though no interest pass until inrolment, yet after inrolment it vests from the date of the deed. 4. *Rep. Hind's Case*. This case is likewise similar to that of dower, where both marriage and death of the husband are requisite; and the marriage is but the inception of it, and no absolute right vests until the husband's death; yet the time of the marriage is material: for if one marry a woman of the age of seven years only, yet if she be nine years old at his death she shall be endowed, notwithstanding any mesne alienation; for though she was not actually dowable at the time after marriage, yet she was conditionally so. *Co. Lit.*

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PILSWORTH. It is very clear, that the act was not intended to relate to any will precedent to it, for there is an express time mentioned when it shall begin to be in force, *viz.* the twenty-fourth of *June*, which would be quite nugatory to say none shall give after such a day, if none could do it before that day; and therefore suppose a man had made a will after making the act and before the twenty-fourth of *June*, nay upon the twenty-fourth of *June*, certainly the act would not reach such a case. It differs from the case cited upon the statute of Uses, for that act took away the use in the life of the party, and so destroyed the thing itself devised. Notwithstanding a will takes no effect until the testator's death; yet in common understanding, a man may and often does say, when he has made his will, "I have given so much to such a person, &c." or "I have settled my effects." And though a will be but a conditional gift, that is, though it contain many implied conditions, as that a devisee live to take it, that he be of capacity to take, and that the deviser does not revoke it, yet it is a gift. Was there anything necessary to be done, that was not done, in order to perfect it? Indeed some act was necessary in order to defeat it, but nothing to perfect it. In *Dyer*, 556. a devise was considered as an assignment; for though the devise take no effect until the party's death, yet when the devisee is in, he is in by the assignment which the deviser made in his life-time; and though it be certain that a gift by the husband to his wife is void, whereas a devise to her is good, yet the reason usually given, *viz.* that the devise takes no effect until his death, is exploded in 2. *And.* 17. for the wife, after the death of the husband, is in by the husband, which could not be unless by some act done in his life-time; and a devise, when it does take effect, takes its force as executed in the life-time of the party; and for that reason, even in the case of the king, it shall take place as prior to an escheat; or in the case of tenant in tail who has discontinued and taken back an estate in fee, a devise by him shall prevent a descent. Though a will speak not until the death of the testator, yet the construction of it is to be made as matters stood at the time of making, 2. *Vent.* 653.; therefore in the case of *Bunker v. Cook (a)* it was adjudged, that lands purchased after

(a) 11. Mod. 106 121.

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making the will would not pass, though the words were, "I give
" all my estate which I shall be possessed of at my death." But
the present question seems to be determined, as near as can be, in
2. *Chan. Rep.* 301. *Coxwill v.* , in a question arising
upon the 29. *Car.* 2. where the testator having made his will in
1675 before that statute took place, which was the twenty-fourth
of June 1679, the will was held to be a good will upon an issue
directed, *deviseavit vel non*, though the testator died after the act,
viz. December 1678. And the like point is said by LORD JEF-
FERIES to have been resolved *Skin.* 227.; and of the same opinion
WAS THE MASTER OF THE ROLLS in *Chan. Prec.* 79. *Serjeant*
v. Puntis.

CLARKE. The existence of a will and the operation of it are
certainly different, and ought not to be confounded. It is a present set-
tlement to take effect *in futuro*; and the very words of HOLT, Chief
Justice, in the case of *Bunker v. Cooke*, in *Fitzgibbon*, are, that it is a
will and a disposition at the time of the making, and the death of the
party relates to that time, as an inrolment does to the time of
executing a bargain and sale, otherwise a will could never take
effect; for if no will until the party's death, it could never prevent
a descent, because at that time the title of the heir accrues. There
may be an immediate legal conveyance, though the beneficial inter-
est is conditional and executory; as a contingent remainder is a
remainder, though contingent; or if a bond be given for a sum of
money payable at a future day, it is due immediately, though pay-
able *in futuro*. As to revocation of wills, acts of the party must be
excepted; outlawry, marriage, &c. only make the will void im-
mediately by taking away the subject matter and property, or im-
mediately avoid it. 2. *Inst.* 474. 272.

COMYNS. Suppose a deed made before the statute of *Will.* 3.
of Stamps, with power of revocation during life, would that be
void because the party dies after? If one release by will to an-
other all his debts, this extends not to debts incurred after making
the will: so if one devise a legacy to a parish where he lives, and
he remove, it shall go to the parish where he lived when he made
his will. A letter of attorney, though in its own nature revoca-
ble, is yet a sufficient authority for doing any act under it till re-
voked.

Ten of the Judges, PARKER, Baron, dissenting, and DENTON,
Justice, being absent, certified to the Lord Chancellor as follows:
"We have heard Counsel on all sides, and are of opinion, that the
" gift of a devise, so far as the same relates to the charitable uses
" aforesaid, is good in law, notwithstanding the statute 9. *Geo.* 2.
" c. 36."

MICHAELMAS

MICHAELMAS TERM,

The Twelfth of George the Second,

I N

The Common Pleas.

*Sir John Willes, Knt. Chief Justice.**Sir Alexander Denton, Knt.**Sir John Fortescue Aland, Knt.* } *Justices.**Sir William Fortescue, Knt.**Dudley Ryder, Esq. Attorney General.**John Strange, Esq. Solicitor General.**Morse against James.*

Case 256.

ACTION OF TRESPASS for driving away the plaintiff's cattle and impounding them, &c. The defendant justified by virtue of an execution from an inferior court of record within the *Forest of Dean*, in the county of *Wilts*; and that being an officer of that court, by virtue of this execution to him directed, he levied the plaintiff's cattle, &c, to satisfy a judgment obtained against him in that court. To this plea of justification the plaintiff demurred, and the defendant joined in demurrer.

The statute 8. Hen. 6. c. 12. does not extend to amend proceedings in inferior courts.

The causes shewn for demurrer were :

FIRST, That the writ was repugnant, in saying that the precept issued the twenty-fourth, and *tested* the twenty-sixth, two days after; and the question was, Whether this was amendable?

THE COURT held, that the statute 8. Hen. 6. c. 12. & 16. upon which writs are to be amended, does not relate to inferior courts; and therefore it is a void writ, and not amendable.

THE SECOND CAUSE shewn was, that it does not appear by the plea that the Court had any jurisdiction of the matter, and therefore their jurisdiction should have been more particularly set forth; and as it is restrained not only to the persons but to the substance of diction.

A justification under process from an inferior court must give the court jurisdiction.

MORSE
against
JAMES.

of the action, and it being a court of record to try matters relating to mines and miners, it should have shewn in the plea that the cause of action upon which this writ issued was for some matter relating to mines or miners.

THE COURT held, that it was absolutely necessary to shew that the action related to mines or miners, for otherwise they have pleaded a prescription, and not brought themselves within it.

In what case a writ must be pleaded with a *prout patet*, &c.

THE THIRD CAUSE was, that as this writ was returned, and pleaded as such, it is a record; and being so, it ought to be pleaded with a *prout patet per recordum*.

THE COURT held, that this also was necessary; as they have set out the return, and thereby made it a matter of record, it was incumbent upon them to verify it with a *prout patet per recordum* (a).

A bad writ or warrant will justify the officer who executes it, if the court or magistrate had jurisdiction.

AND LASTLY. Whether under this writ, and thus pleaded, the defendant's justification is good?

THE COURT held, that an officer might justify under a writ bad in matter of form; but if the writ be out of the jurisdiction of the Court, he cannot justify under it; as a constable may justify under a warrant of a justice of peace, be it ever so bad, for want of form; but if a justice of peace make out a warrant for any matter out of his jurisdiction, there the constable cannot justify, because he was not obliged to obey, and he must take notice of it at his peril.

For these reasons, judgment was given for the plaintiff (b).

(a) But this is only matter of form, defendant, 1. Vent. 662. 2. Keb. 173. Duncombe v. Church, 1. Salk. 1. Fan- 198. 3. Keb. 213. Cro. Jac. 61. 161. shaw v. Morrison, 2. Salk. 520, 521. 561. 1. Levin. 173. Sir T. Jones, 41. (b) Cases cited for the plaintiff, Plowd. 2. Salk. 700. 5. Co. 90. 1. Salk. 1. 471. 1. Salk. 408. 1. Inst. 303. 2. Levin. Entr. 179. 182. 206. Thomf. Salk. 565. 3. Levin. 29. 1. Levin. 211. Entr. 333. pl. 56. 331. 312, 313. pl. 52. 1. Lutw. 26. 2. Lutw. 915. For the

Case 257.

Shipman against Thomson.

An executor may sue in his own name for monies received subsequent to the testator's death, and the defendant cannot set off a debt due to him from the testator.

ASSUMPSIT for money had and received to the plaintiff's use. The defendant pleaded *non assumpsit*, and set off against the plaintiff's debt.

A CASE was made at the assizes for the opinion of the Court: The plaintiff's husband made her executrix; the defendant, after the testator's death, received several sums of money for rent due to the testator in his life-time, for which this action was brought; and the defendant would have set off several sums of money due from the testator to the defendant against the plaintiff's debt.

The

The questions made upon this case were, Whether the plaintiff should not have sued as executrix to her husband? and then, if she had sued as executrix, Whether the defendant could not have set off his debt against the debt owing him by the testator in his lifetime?

SHIPMAN
against
THOMSON.

THE COURT. This debt, when recovered, will be assets liable to the testator's debts; and if the defendant could be allowed to set off his debt, he may pay himself before the bond-creditors are paid, and by that means simple contracts would be paid before debts of a superior nature. We think the action is very properly brought; for when money is due to the testator himself, but received after his death, the executor may sue in his own right; but if the cause of action arose in the life-time of the testator, there he must sue as executor. Therefore we are of opinion, that the *posse* must be delivered to the plaintiff.

Cockerill against Armstrong.

Case 258.

TRESPASS for taking away and impounding the plaintiff's horse. The defendant justified as servant to the bailiffs and burghesses of Scarborough, who were seised in fee of a certain common, and that he took this horse *damage feasant* upon the common as their servant, &c. To this plea the plaintiff replied generally, *de injuriâ suâ propriâ absque tali causâ*.

The defendant demurred specially, because the plaintiff, by his replication, has traversed several matters; and that no issue could be taken thereupon.

AND TO THIS the cases cited were, 8. Rep. 66. *Tham. Entr.* 296. 307. 361. 364. *Yelv.* 153. *Brownl.* 215. that where no title can come in question, and it is only matter of excuse, there *de injuriâ suâ propriâ, &c.* may be good.

ON THE OTHER SIDE, for the plaintiff, the cases cited were, *Cro. Car.* 138. 3. *Mod.* 137. 1. *Roll. Rep.* 333. *Cro. Jac.* 224. *Salk.* 643. 2. *Saund.* 295. *Salk.* 107. where possession is sufficient in transitory actions. *Salk.* 628. *Yelv.* 75. *Moor.* 146. 2. *Mod.* 70. *Lutw.* 1492. *Salk.* 643.

S. C. Comy.
Rep. 582.
Cro. Eliz. 359.
1. Lev. 307.
2. Show. 310.
1. Ld. Ray. 640.
2. Ld. Ray.
1483.

THE COURT. The question is, Whether that plea has not more than mere matter of inducement necessary for the plaintiff to answer in his replication? As the defendant has thought fit to lay a seisin, it was necessary for him to prove it, and therefore he ought to have had an answer from the plaintiff. We think, that *de injuriâ suâ propriâ* generally is not a good replication; for here are several things put in issue, whereas all issues ought to be single. It was not necessary to set out the seisin in fee, possession would be sufficient; but as they have done it, it will be incumbent on them to prove it.

Judgment was given for the defendant (a).

(a) See Crogate's Case, 8. Co. 67.

Drinkwater

Case 259.

Drinkwater against Quenell.

If *A.* inclose money in a parcel of goods belonging to *E.* and *B.* send the parcel to *C.* a common carrier, and the parcel is lost, *A.* may maintain an action against *C.* for the money, although he did not tell the carrier that money was contained in the parcel, and although he only received the rate of carriage for goods.

ACTION against the defendant, as a common carrier, for losing a parcel of goods, in which two hundred pounds were inclosed which belonged to the plaintiff, but the goods to one *Gears*.

THE JURY find, that the carrier, when he carried money for any one, charged five shillings for every hundred pounds; and if it was less, two-pence in the pound; that upon a conversation some time before the action was brought between the defendant and *Gears*, the defendant told *Gears* he never would carry any more money for him unless he gave him notice of it; upon which *Gears* said, if he did not like it he should send it back again: that it was sent to the carrier by a servant of *Gears*'s, who, when he delivered it, bid the carrier take care of it, for it was a parcel of silk: upon this the carrier took it, and charged *Gears* for the carriage one shilling and threepence.

Upon this case two questions arose:

S. C. Bull. N. P. 75.

FIRST, Whether an implied *assumpsit* arose to the plaintiff, there being no agreement between the plaintiff and defendant, only as it was his money sent by *Gears* among his goods, in whose name the defendant insisted the action ought to be brought?

SECONDLY, Whether the carrier, under the circumstances of this case, shall make good the loss of this money to the plaintiff?

FOR THE DEFENDANT it was said, that he had received no reward for carrying the money, and that the plaintiff had used this fraud in order to deprive him of his just demand for it: that the defendant was obliged to carry it, otherwise he would have been liable to an action at the suit of *Gears*, for his refusal so to do (*a*); that the defendant upon that conversation had cautioned *Gears* from sending money without notice, and therefore had no occasion to repeat it again; that though the servant was guilty of the fraud, yet his master is answerable for it in this case; and that the carrier had only one shilling and threepence, whereas he ought to have had eleven shillings and threepence.

The cases cited were, *Cro. Jac.* 331. 366. 1. *Sid.* 36. *Carth.* 331. *Hawk. P. C.* 90. 3. *Lev.* 37. *Allen*, 29. 1. *Roll. Abr.* 32.

ON THE OTHER SIDE it was said, that the carrier was liable, unless he made a *special acceptance*; and that one is not obliged to tell a carrier what is contained in a parcel.

The cases cited were, *Salk.* 143. *Hob.* 17. 2. *Saund.* 379. *Kelyng.* 39. 1. *Dan. Abr.* 15. *Moor.* 462. 1. *Vent.* 190. *et*

(*a*) *Meor.* 374. *Skin.* 238. 2. *Show.* (b) *Cro. Jac.* 471. *Salk.* 441. 127.

208. *Salk.* 388. *Allen*, 93. *Moor*, 158. *Dyer*, 266. *Cro.* DRINKWATER.
Jac. 371. ^{against}
 QUEENET.

After a consultation with the Judges, WILLES, *Chief Justice*, gave the judgment of THE COURT. A carrier is liable for every thing he takes, unless he accepts it specially. The case in *Allen*, 93. is in point, and so is that 1. *Vent.* 190. 238. *Morse v.* The defendant would have this to be a very great hardship upon him; but I think it none, because it is in his own power to save himself by a special acceptance. And as to the fraud in this case, WE ARE ALL OF OPINION, that a man is not obliged to let a carrier know what is in a parcel, and therefore he may disguise it; for he may accept it specially; and that might be an encouragement for robberies rather than an hindrance.

WE LIKEWISE THINK the action is properly brought; for though there was no contract proved between the plaintiff and defendant, yet there is an implied one, which, with the plaintiff's having a property in his money, has entitled him to his action; for as the carrier might have detained the goods until the carriage was paid for, so must he stand to the loss of them if they meet with any accident.

It is also found, that upon the conversation between the defendant and *Gears*, *Gears* said, if he did not like them he might send them back again; so that by the defendant's accepting them, if any advantage might otherwise have been taken (but we think there could be none), by that acceptance he has waived it.

For these reasons we are of opinion, that *the possea* must be delivered to the plaintiff (a).

(a) But see *Titchburne v. White*, 485. *Gibbon v. Paynton*, 4. *Burr.* 2298. 1. *Stra.* 145. *Tyler v. Morris*, *Carth.* *Clay v. Wilson*, 1. H. Bl. Rep. 298.

Davis against Powell.

Case 260.

TRESPASS for distraining the plaintiff's deer. The defendant justified as servant to *Lord Cadogan*, who had leased to the plaintiff thirty acres of land, upon which he (the plaintiff) was to keep one hundred deer, and to have liberty to sell them at the expiration of the term; but the plaintiff being in arrear to my Lord for rent, the defendant distrained the deer. Deer may be distrained for rent.

The question was, Whether deer are distrainable or not?

It was said by the plaintiff's Counsel, that deer being *fera natura* are not distrainable (a).

(a) *Finch*, 126. *Co. Lit.* 47. 1. *Roll. Abr.* 666. 3. *Lev.* 227. 7. *Co.* 17. 9. *Inst.* 109. *Hawk. P. C.* 124.

For

DAVID
against
POWELL.

IT WAS ALLEDGED for the defendant, that the nature of things changes, and with them the reason of the law; and though formerly deer being considered *feræ naturæ* could not be distrained, being then kept for pleasure, yet they are now chiefly kept for profit; and therefore that reason fails now.

And judgment was given for the defendant.

Case 261.

Bayley and Others against Lloyd and Others.

A release from one trustee after action brought may be pleaded in bar.

DEBT ON BOND by the plaintiffs, as trustees, &c. to which the defendants pleaded a release from one of the trustees after the action brought. To this there was a demurrer and joinder.

And the question was, As this was not in the plaintiff's own right, but as it was in the right of a company, and it being a common release, whether it could bind the other plaintiffs, parties (a)?

THE COURT. The obligees have the only legal interest in them; and consequently the only right to release; and a release from the one being a release from the other, it is certainly well pleaded. The case of the *Countess Kent* was cited.

Judgment for the defendants.

(a) 1. Lev. 272. Cro. Eliz. 6. 2. Roll. Abr. 409. 2. Lev. 214. 3. Lev. 293. Moor, 532. 1. Leon. 263.

Case 262.

King against King.

Original writ not amendable, unless in a mere misprision.

MOTION to amend an original and declaration. The action was brought by the plaintiff as administrator, whereas he and another were executors.

And the question was, Whether this could be amended?

3. Co. 159.

2. Roll. Abr. 198.

1. Lev. 2.

2. Vent. 46. 49.

Ld. Ray. 1057.

FOR THE AMENDMENT the cases cited were, *Cro. Car.* 74. 3. Lev. 147. 2. Vent. 173. *Co. Reports*, *Blackmore's Case*.

ON THE OTHER SIDE it was insisted, here was nothing to amend by.

WILLES, Chief Justice. The motion is to amend the declaration and original; but in fact it is but one amendment; for if we grant the amendment in the original, the declaration may be amended of course; so that the question will be, Whether we can amend the original? And as to that there are two rules by which we are to be governed: the one is, that no amendments in original writs can be made, unless it be the misprision of the clerk; the other, that nothing can be amended unless there is something to do it by. In the present case it is not so much as pretended that there is any misprision in the clerk or officer, nor is there any proceeding in the court to amend by. The administration is the act of another court, in which we have nothing to do. Since the statute has

has laid down these rules, whereby we are to be led, the present case not coming within either of them, I think we cannot amend it.

DENTON, *Justice*. The amendment now desired is, to set forth a new title, which I think is so far from being the meaning of the statute, that it is quite the contrary. If the plaintiff has mistaken the title, we cannot help that. An original writ has often been determined not to be amendable. I think we have no power to grant the amendment.

FORTESCUE ALAND, *Justice*. I do not know how we can amend an original. *Gage's Case* is misreported (a), for the Court there held, that it could not be done. A bill in the king's bench is in nature of an original, and an amendment in the date of it (b) has been refused. A writ of error is an original, and was refused to be amended till allowed by act of parliament (c). I think it cannot be amended.

WILLIAM FORTESCUE, *Justice*. It is undoubtedly true, that original writs are not amendable by common law, because they issue out of another court over which we have no jurisdiction, and therefore have no authority over their proceedings; and all the power we have to amend is given us by the statute. I think, we ought to carry the intent of an act of parliament as far as it is in our power; but surely we cannot carry the meaning of this act (which only helps the mistake of a clerk) so far as the amendment now desired, because that is matter of substance; nor is here anything upon record in our Court to amend it by: Therefore I am against the amendment.

(a) 5. Co. 45.

(b) 3. Cro. 286. 482.

(c) 1. Salk. 52.

Eaton against Southby.

Case 263.

REPLEVIN for taking and retaining seventy shocks of wheat. The defendant avows the taking, for that he was *seised in fee* of a messuage and one hundred acres of land, and demised to one *Dunsby*, his executors, administrators, and assigns, to hold for one year, rendering rent, to be paid quarterly, by virtue whereof he entered and was possessed; and because at the time when, &c. thirty-one pounds five shillings for one quarter's rent were in arrear, he distrained the wheat, being upon the ground there.

A distress cannot be made upon a tenant at will after the tenancy is determined; nor can a distress be made of goods taken in execution (a).

The plaintiff, in bar to the avowry, PROTESTING against the estate and demise, pleaded, that one *Henry Lasber* recovered a judgment against one *George Saunders*, and took out execution upon it; after which *Saunders* died; and that there having been seven acres sown with wheat by the said *Saunders* in his life-time, who, at the said time of sowing, having been possessed thereof as tenant at will to the defendant, the sheriff took in execution, by virtue of the said writ of *fieri facias*, the said wheat, and afterwards, and before the taking, sold it to the plaintiff; and that the plaintiff, being so possessed of the said wheat, permitted it to grow till, in a course of husbandry,

S. C. 2. Barnes, 166.

(a) Sec 8. Ann. c. 14. s. 6. and 11. Geo. 2. c. 19. s. 14.

It

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it was fit to be cut, and afterwards cut it, and made it into shocks, and let it lie until, in a course of husbandry, it was fit to be carried away; and the said defendant of his own wrong, after this, and before it was fitting to be carried away, took and detained, under a pretence of a distress, the said shocks of wheat (a); and that at the time of the distress there were other goods and chattels on the premises sufficient to answer the value of the said rent; and then avers, that the shocks so sold to and cut by him are the same as mentioned in the declaration and avowry; and therefore prays judgment and his damages. To this there was a general demurrer and joinder, &c.

THE QUESTION in this case was, Whether the plea in bar be good or not?

IT WAS OBJECTED by the defendant's Counsel, that it is not sufficiently averred that *Saunders* was tenant at will to the defendant. It says, "that he at the time of sowing the corn having been possessed as tenant at will, &c." which relates to a time past, and is not an averment that he was so at the time of the sowing; and the plaintiff ought to shew a lawful possession in *Saunders*, in order to entitle himself to the corn, for replevin is a real action (b); and as this is matter of substance, it is not necessary to be shewn for cause of demurrer. The commencement of the estate at will ought to have been particularly shewn (c). The execution was tested the last return of *Hilary Term*, and on the twenty-second of *March* delivered to the sheriff; after which, and before the sheriff seized, *Saunders* died; and that upon his death the sheriff's power was determined. Where the sheriff makes a seizure before the death of the defendant, he may sell it afterwards; but whether he can seize after the death of the defendant, though the execution was delivered to him before, must be submitted: and if the sheriff could not seize the corn, they must fail in the justification. But supposing it be otherwise, the landlord's rent must issue out of the land, and the profits of it are the security for the landlord; and they are in the custody of the law no longer than they are in the sheriff's possession; and when the sheriff makes his bill of sale, the bargainee must take care of them at his peril (d). I am aware of its being objected, that this was not the shock of the tenant from whom the rent was due, for that, it seems, was due from another tenant since his death. The land is the landlord's debtor; if so, he is not to enquire to whom the corn belongs. When a landlord seizes cattle *levant et couchant*, it may be said that these are not the cattle of the tenant. What if they are not? There he finds them eating the profits of his land which is charged with the rent; it is nothing

(a) But see the statutes 2. Will. 3. c. 5. and 11. Geo. 2. c. 19. s. 2.

(c) 2. Lutw. 1313. 3. Lev. 220. Yelv. 147.

(b) Finch, 316. Booth on Real Actions, 2. F. N. B. 201. Carth. 9. 1. Lutw. 1490. Co. Lit. 303. Cro. Cas. 571.

(d) 3. Lev. 260. 2. Vent. 50. 2. Saund. 189.

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to him whose they are; and here is corn found upon our ground; it is nothing to us whose it is (a).

IT WAS SAID *for the plaintiff*, that they were not making out a title; that they admitted it to be in the defendant; for it is said, that he was possessed as tenant at will to the defendant; but no distress can be taken of tenant at will after the determination of the will; for by the statute of the 8. *Anne* it is required, that the possession of the tenant does continue; and here the will is determined by the act of God; and this distress is not for the rent of the tenant at will, but of another tenant; and it is averred in the plea in bar, that there were other goods and chattels on the premises out of which he might have had full satisfaction for the rent; and if the landlord determine the will, if his corn be sown, he or his representatives shall have free ingress, egress, and regress, to enter into the premises, and take and carry away the corn (b): that he had a right to keep the corn there, for being distrainable it was *in custodia legis*, until it was fit to be carried away; and nothing is distrainable in a place where the owner has a right to put it (c).

After several arguments,

WILLES, *Chief Justice*, gave judgment. The question in this case is, Whether the plea in bar be good or not? And as to the objections taken to the *form* of it, that it is not sufficiently averred that *Saunders* was tenant at will at the time of sowing the corn, and that the particular commencement of the estate ought to have been shewn, WE THINK there is no weight in them; for it is a rule, that pleas shall be construed according to a *common intent*. There was a distinction taken, that replevins might either be real or personal actions, according to the manner of pleading them. When the title of the land was brought in question upon the pleadings, then it was a real action; but when not, then a personal one; and to warrant it cites *Finch's Law*, 316. where it is laid down so: but we think it is a distinction without any manner of foundation, for an action is not real or personal according to the manner of pleading it, but for that which is recoverable by it; and in replevin a man cannot recover anything that is real. Was that distinction to hold, actions of trespass, nay even actions of debt, may become real actions. But I think a replevin cannot be a real action in any case whatsoever.

As to the objection of the sheriff's having no power to seize the corn, because *Saunders* the tenant at will died before it was levied, WE THINK there is nothing in that neither, for the goods are bound from the time of the delivery of the writ to the sheriff.

(a) 1. Salk. 368. Latch, 8.

(c) 2. Vern. 129. Cro. Eliz. 549.

(b) Co. Lit. 47. 56. Dalt. Sheriff, 556. 1. Vent. 222. Bro. Atr. 257. pl. 74. Yelv. 74. Cro. Car. 138. 2. Mod. 80. 3. Mod. 132. Salk. 460.

596. and Read v. Barnes, Cro. Eliz.

Goods taken in execution cannot be distrained.

1. Vent. 221.
Comy. Rep. 203.
1. Ark. 102.
Dougl. 411.
Gilb. Dist. 51.

But the principal objection, and which was most relied upon, was the last, and that was this, Whether the goods once taken in execution could be distrained or not?—AND WE ARE ALL OF OPINION, that they cannot, because they were in the custody of the law. *Co. Lit.* 47. a. And we think, that had there been no execution at all in this case, that the corn could not be distrained, for this is a distress upon a tenant at will, or his representatives, which is the same thing, after the will is determined, not by himself, but by the act of God. And if we should think this distress lawful, we should overturn all that known and undoubted law laid down in *Litt. sect.* 68. that the man that sows shall reap. It was rightly said upon the argument, that the landlord could not let the land in any other condition than he had it, which was subject to the privilege of the tenant's having free ingress, egress, and regress, to take away the corn as sown.

We are, therefore, clearly of opinion, that judgment must be given for the plaintiff.

Case 264.

Pitts against Evans.

A clerk of a parish is a temporal officer, and must sue for his dues in the temporal courts, and not in the spiritual.

S. C. 1. Barnes, 305.
S. C. Pract. Reg. 356.
S. C. 2. Stra. 1108.
2. Roll. Abr. 234.
Cro. Car. 589.
1. Bl. Com. 395.

ON MOTION to shew cause why a prohibition should not go to the consistory-court of the *Bishop of London* to stay the proceedings in a suit commenced there by a parish-clerk for his dues, according to a rate agreed to by the parish;

IT WAS ARGUED BY THE COUNSEL *against the prohibition*, that the office of a clerk was a spiritual office, and that his salary for serving that office must necessarily be of ecclesiastical cognizance; that he is to be chosen by the parson; and that in some churches they read the first lesson. 2. *Roll. Abr.* 300. 307. *Salk.* 332. *Keyl.* 100. *Fitzg.* 189.

ON THE OTHER SIDE it was said, that the office of a clerk was merely temporal (a), and that all he had to do was, to wait upon the parson, put on his surplice, say "amen" when he was out of breath, and perhaps set a psalm when the parson cannot sing; that a curate cannot sue in the ecclesiastical court for his pension; and that an *assumpsit* will lie for it is expressly laid down in the case of *Burth v. Wood*, *Salk.* 506. It is no matter by whom he is to be chosen, for that cannot make the office the more spiritual or temporal. 2. *Roll. Abr.* 234. 283. 286. 2. *Cro.* 670. 13. *Co.* 70. 1. *Kebl.* 286. *March*, 101. 6. *Mod.* 252. *Parker v. Clark*, 2. *Salk.* 556.—This fee is due, they say, by custom; if so, an *indebitatus* will lie for it, for all customs imply a promise to perform it. Proctors fees are to be sued for at common law. *Salk.* 333. *Jefford's Case*.

(a) *Peake v. Pournie*, 2. *Stra.* 942. *Tarrant v. Heyly*, 1. *Burr.* 367. *Rex v. Warren*, *Cowp.* 370.

PITTS
against
EVANS.

WILLES, *Chief Justice*. The power of granting prohibitions is not, as has been said, a discretionary power in the Court. Can we in one case grant a prohibition, and in another (though attended with the same circumstances) deny it? No; we are *ex debito justitiæ* bound to do it. If a suit be brought for the same matter into two courts where there is a concurring power, the Court in which it was first commenced has the cognizance of it. *Hob. 66. 1. Salk. 63.* What estate the clerk has is out of the question; and so is the right of electing him. There are two points to be considered: Whether the office of a clerk be spiritual or temporal? and supposing it to be spiritual, Whether he can sue for his fees in the ecclesiastical court? And for my part, I do not look upon the parish-clerk to be any order at all; I know of none but bishops, clerks, and deacons: but I do not consider him as an assistant to the parson, nor look upon him as the parson's footman, as was said, but I take him to be an assistant to the parish: and I do not doubt but those books which say he is a temporal officer are good law; and being a temporal officer, the salary, or whatever is to be given for the service of the office, must of consequence be of temporal cognizance: that being so, I think the ecclesiastical court has no jurisdiction; and therefore a prohibition ought to go.

DENTON, *Justice*, was of the same opinion.

FORTESCUE ALAND, *Justice*. If we think the ecclesiastical court has no cognizance, we are *ex debito justitiæ* bound to grant a prohibition. 2. *Vent. 34.* That a parish-clerk is a temporal officer has often been determined. 2. *Brownl. 38.* I think the clerk has an estate for life; though in the case 2. *Cro. 670.* two Judges were of opinion, that he had a freehold estate, and not an estate at will, for that the parson cannot turn him out. But whether he is a spiritual or temporal officer, he cannot sue in the ecclesiastical court for his fees; for, How are they due? Why, by a rate agreed to by the parish; and surely he may bring his action upon the agreement: and as for proctors fees, it is most certain they cannot be recovered in the spiritual court, because it is in itself a temporary fee, and not settled by any canon. 1. *Salk. 330.* And I am the more ready to grant a prohibition, because no writ of error lies there.

The office of parish-clerk is an office for life, and he cannot be removed at the pleasure of the parson.

1. Black. Com. 395.

WILLIAM FORTESCUE, *Justice*. The only question, I take it, is, Whether the matter sued for be of ecclesiastical cognizance or not? For if it be an ecclesiastical matter, it does not avail what the person is, and he may sue for it in that court; and so *à contra*. If the person suing be an ecclesiastical man, and the matter temporal, I think a prohibition ought to go.

And it was accordingly granted.

Case 265. The University of Cambridge against Lamb and Gibson.

If a *quare impedit* be brought by a person as executor who is not so, the Court will not, on his taking out administration, allow the record to be amended after six months have expired from the time the writ issued.

THE UNIVERSITY claimed the presentation to the church of G. in the diocese of *Carlisle*, in the province of *York*. A *quare impedit* was brought by one *King*, as executor of *John King*; and afterwards finding that he was not executor, he took out a joint administration with his sister under the archbishop of *Canterbury*; and then moved to have the record amended, six months being passed since the writ was brought.

BOOTLE, *Serjeant*, for the amendment, cited, 3. *Cro.* 119. 1. *Cro.* 74. 3. *Lev.* 347. *Fitzgib.* 193. 4. *Lev.* 12. and many others on both sides. 1. *Danv.* 346. *Sid.* 412. 2. *Vent.* 152. *Hob.* 118. *Noy*, 64. 2. *Cro.* 587. 8. *Co.* 159. & 162. 5. *Co.* 45. *Styles*, 115. *Litt. Rep.* 50. *Hob.* 29. 1. *Vent.* 154. *Salk.* 301.

AN OBJECTION too was made, that administration was taken under the archbishop of *Canterbury*, whereas the church lay in the province of *York*; and as several administrations must be taken out where goods lie in several provinces, as 2. *Lev.* 86. *Hord.* 216. so must it be in the case of an advowson. This point was not determined.

But to the amendment, WILLES, *Chief Justice*, said, that at common law no original was amendable in case of a common person; that the statute of 14. *Edw.* 3. c. 6. extended only to judicial writs, "process" being the word used in the statute, which does not comprehend original writs; that the first statute that gave amendment in a *quare impedit* to a common person was 8. *Hen.* 6. 12.; and as our power of amendment is derived entirely from that statute, and as it extends only to misprisions of the clerk, and does not distinguish this case, no more can we. All the authorities cited were amendments merely of the misprision of clerks, and the difference in all of them is made between matters of substance and palpable neglects; that the inconvenience only influences the Court where their power is discretionary, not where it is limited by statute; and that amendments are now brought to be tried by two rules: first, The insufficiency must proceed from the misprision of the clerk; secondly, there must be something in the record to amend by. As to the first: In the case at bar, there is no misprision or *nesciens* of the clerk pretended, but the original is founded on a wrong title; and as it issues out of chancery it cannot be amended here, unless it come within the statute. And he disapproved of the distinction taken in 8. *Co.* between the ignorance and negligence of the clerk as too nice. Secondly, There must be something to amend by, as in *Cro. Jac.* 587. 5. *Co. Page's Case.* 3. *Cro.* 286. 462. A bill is not amendable by a declaration, but a declaration is amendable by a bill. No writ of covenant can be amended, either by common or statute law, as *Salk.* 52. But

But here the administration is not sufficient to amend by, and there is nothing else alledged; and therefore

PER CURIAM, No amendment can be in this case, since there are no proceedings in this court by which it may be amended.

THE
UNIVERSITY
OF CAMBRIDGE
against
LAMB AND
GIBSON.

Pain against Womanfell.

Case 266.

AN ACTION OF DEBT was brought against the sheriff for not paying a year's rent to the plaintiff, out of the monies levied on the goods of his tenant, taken in execution; according to the statute 8. Anne, c. 14.

An action lies, at the suit of a landlord against the sheriff, for neglecting to pay him a year's rent on an execution on the goods of his tenant; and the declaration in such action need not recite the statute of 8. Anne, c. 14. nor the judgment on which the execution was founded.

After a verdict given, this Court was moved in arrest of judgment;

FIRST, That the action did not lie against the sheriff, but against the plaintiff in execution.

SECONDLY, That the declaration was defective, for it ought to be *qui tam*, &c. as in the case of *Lady Waterhouse v. Bawd* (a).

THIRDLY, That the statute 8. Anne, c. 14. should be set forth particularly.

FOURTHLY, The judgment on which the execution was founded should be mentioned in the declaration, as 1. *Saund. 37. Jones v. Pope. 1. Lev. 191.*

1. Stra. 97.
B. R. H. 255

THE COURT. The action well lies against the sheriff; for the statute says expressly, "he shall levy the debt on the goods taken in execution;" and by the execution the goods are the sheriff's, and consequently liable to the debts to be paid out of such goods. As this is by a statute, if that were not pursued the whole would be illegally executed.

TO THE SECOND OBJECTION, It is true, that where a statute prohibits a thing, and no penalty, where the king is to have a fine the declaration should be *qui tam*. So for suing in the spiritual court for matters temporal is a contempt to the crown.

SKINNER, *Serjeant*, from the Bar, said, that where an action is given by a statute to a party grieved, or to any certain person, it may be brought in his own name, except a fine be due to the king; but if the action be incertainly given, it may be otherwise.

TO THE THIRD OBJECTION the Court said, that it is a general statute, and is well enough set forth; and if he set it forth more particularly, it is at his own peril.

TO THE FOURTH OBJECTION the Court said, that the judgment need not be set forth. The Books cited are on action of escape, where the judgment is the ground of the action, and the plaintiff claims merely under it; but here the landlord is not concerned in the judgment, nor claims anything under it: this point was, on solemn consideration, resolved before, in the case of *Wyndham v. Palgrave*, in the sixth year of George the First, in the king's bench (b).

(a) Cro. Jac. 135.

(b) Fortesc. Rep. 372.

Case 267.

Mathews against Lee and his Wife.

In debt against an heir on the bond of his ancestor, if the defendant plead *riens per descent*, and the plaintiff reply that he had lands by descent, a verdict finding that he had sufficient assets is good, without finding the value of the land.

R. C. 1. Barnes, 329.
Co. Lit. 227.
Plowd. 140.
3. Lev. 130.
224.
Co. Car. 157.
Show. 244.

MATHEWS brought an action in the *debet et desinet* against Lee and his wife, as heirs of Clement Wall, in an obligation for him and his heirs for sixty-four pounds.

The defendants plead, "nothing by descent at the time of the writ purchased, or at any time since."

The plaintiff replied, that they had; and issue being joined, a verdict was found for the plaintiff, that they had sufficient assets at the time of the writ purchased.

IT WAS MOVED in *arrest of judgment*, that the finding was ill, for the replication being according to the statute, the jury should consequently find the value of the lands.

WILLES, *Chief Justice*, said, three things were to be considered, viz. the action, the replication, and the plea.—As to THE ACTION, he and all the Court held, that all the proceedings here were at common law, and that the finding was good; for at common law the action lay against the heir in respect of the lands descended, and he was chargeable only whilst he had assets, and if he had aliened the land before the writ purchased. "Nothing by descent at the time of the writ" was a good PLEA and bar to the action, for he was not chargeable with respect to his person, except for pleading a false plea; and then if assets were found, though not to the value, he was liable to the whole debt for pleading that he had no assets when in truth he had. So when an executor pleads, "*never executor*," To remedy which disadvantage to the creditor, the statute was made which gives a replication that he had assets by descent before the writ purchased, and directs that the jury find the value of the lands, because judgment be given to the value of the lands descended against the heir as for his own debt (if he has aliened the lands by descent), but not against the alienee: and half the heir's lands may be extended on an *elegit*; and THE REPLICATION at common law concluded to the country; but on the statute by averment to give the party an opportunity to prove he had not lands by descent; and the statute takes not away the common law. And

FORTESCUE ALAND, *Justice*, said, if the replication had been by the statute, he could not have a writ of enquiry, because the statute expressly says, the value shall be found by the same jury.

Case 268.

Pindar against Smith.

On a covenant to give notice to a particular person, a plea of performance stating the notice but

DEBT ON AN OBLIGATION for two thousand pounds for the performance of covenants of an indenture between Roberts and Pindar (being sheriff) of the one part, and Smith and others on the other part. The defendant pleaded performance, &c. mistaking the *Christian name* of the party to whom it was to be given, is immaterial.

WRIGHT,

WRIGHT, *Serjeant*, took two objections to the defendant's plea :

PRINCE
against
SMITH.

FIRST, That where in the covenant it was contained that *Pindar* (one of the parties to the indenture) should institute no action or outlawry without giving notice to *John Stanyhaff* (who in the former part of the indenture was named *Joseph*) ; and he pleads, that he instituted no action without acquainting *Joseph*, whereas the covenant was to acquaint *John*.

And to support this objection he cited the case of *Harvey v. Stock (a)*, on a replevin-bond to appear and prosecute, and return the distress to *Thomas Haw* ; and being removed into this court by *certiorari*, the plaintiff pleaded that the said *Thomas* did not appear and prosecute, &c. whereas it should be the said *Rebecca* ; and he quoted 2. *Saund.* 302. 305.

THE SECOND OBJECTION was, that the defendant should have pleaded with a *profert* ; and to prove that he should have so pleaded, he cited the following cases : 2. *Salk.* 498. 6. *Mod.* 237. 1. *Saund.* 8, 9. 1. *Sid.* 308. & 425. 1. *Vent.* 37. *Bro. Monstr. de Faits*, 28. *Keilw.* 71. 1. *Roll R.p.* 20. The defendant is obliged to give *oyer*, if the plaintiff demand *fort*. In debt on bond for performance of covenants, performance may be pleaded without a *pro-*

it ; and 10. *Co.* 92. parties and privies should shew forth the deed ; and he admits himself both party and privy by pleading performance ; and he acts in his office under that covenant. As to the objection, that it is the deed of the covenantee, and consequently the covenantor cannot produce it, as 10. *Co.* 92. *Co. Lit.* 225. b. *Cro. Jac.* 217. *Dy.* 277. *Plowd.* 55. and 148. *W. Jones*, 377. ; that a stranger shall not be forced to shew forth a deed ; and also, that as all the covenants in this deed were for the benefit of the plaintiff, and the defendant can claim nothing by them, he should not be obliged to produce it ; he answered, that if the covenantor swear he had not a counterpart, or that he lost it, the plaintiff, by the favour of the Court, shall give him *oyer* ; and a stranger he cannot be, being a party to the deed ; and he had a benefit by the covenants, being the consideration on which his office was confirmed to him, and by which he received his fees.

THE COURT held, that THE FIRST OBJECTION was of no force, and not like the case of *Harvey v. Stock* ; for *Thomas* had been named before, and so a substantial variance ; but here there is no *John*, and it appears *Joseph* must be meant.

WILLES, *Chief Justice*, as to THE SECOND OBJECTION, said, that in an action of covenant the plaintiff shall set forth the deed, because the breach of the covenant is the ground of this action ; but in an action for the penalty in a bond to perform covenants, the defendant shall set forth the deed, because it is the ground of his defence. But would advise.

(a) Easter Term, 10. Geo. 1. *Harvey v. Stokes*, Comy. 566.

PINDAR
against
SMITH.

DENTON and FORTESCUE ALAND, *Justices*, were clear for the plaintiff on the reasons given. But

W. FORTESCUE, *Justice*, thought it hard that the plaintiff, by a mistake of the defendant's, should recover so great a sum without any breach shewn; and if he could shew any, he may the more readily waive the advantage he got by pleading, and try the merit. Wherefore he thought it should be spoke to again.

MICHAELMAS

MICHAELMAS TERM,

The Twelfth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt. Chief Justice.*Sir Francis Page, *Knt.*Sir Edmund Probyn, *Knt.*Sir William Chapple, *Knt.*} *Justices.*Dudley Ryder, *Esq. Attorney General.*John Strange, *Esq. Solicitor General.*

The King against Willis.

Case 269.

MR. STRANGE, *Solicitor General*, shewed cause why the Court should not make absolute a rule for a *mandamus* directing the steward of the borough of *Christ-Church* to hold a court-leet, and to charge the jury to make proper presentments; and that being sworn, they may present *John Dale* as the person elected mayor, or shew cause to the contrary.

The *mandamus* in this case being to direct a jury to present a certain person as duly elected mayor of the borough of *Christ-Church*, it might as well be moved to have a *mandamus* to a grand jury, &c. to find a bill; for all juries are sworn to present things as they appear before them. And this is such a new kind of *mandamus* as never was moved for before, except in *Comb. 239.*; and they ought to have a general *mandamus*.

MR. SERJEANT EYRE and MR. CHUTE argued in support of the rules, that a general *mandamus* in this case would be useless, and *mandamus's* are not always granted in general terms. The statute of 11. *Geo. 1. c. 4.* is a remedial law, and therefore ought to be so expounded as to remedy defects. And this case is within the act 11. *Geo. 1. c. 4. f. 3.* There is no colour to say in this case that this is predetermining the right of election; they may return that the person is not duly qualified.

A *mandamus* granted to the steward of a borough to hold a court-leet, and to present a particular person as the person elected mayor.

Raym. 431.

1. Sid. 40.

2. Lev. 18.

2. Stra. 797.

893.

1. Burr. 137.

B. R. H. 261.

5. Com. Dig.

"Mandamus".

(A.).

LEE,

THE KING
against
WILLIS.

LEE, *Chief Justice*. The clause of the act of parliament relates to presentments of persons elected. This rule directs: *FIRST*, That there shall be a court-leet held by the steward for the borough of *Christ Church*; *SECONDLY*, That he charge the jury to make proper presentments; *THIRDLY*, That being sworn they may present *John Dale* as being elected mayor. If he is not elected, it may be so returned to the *mandamus*; and it is not at all final to them, nor are they precluded. Neither do I see any inconvenience in granting a *mandamus* in this way; the next rule being, that they present *John Dale*, or shew cause to the contrary.

PAGE, *Justice*, was of the same opinion.

PROBYN, *Justice*. Unless this *mandamus* is granted, as it is prayed, it will be saying that the borough of *Christ Church* is not within the statute. If there is no way to compel the jury to present, the steward will always have an excuse for not admitting and swearing a mayor for want of the jury's presentment. Therefore I think the *mandamus* necessary.

CHAPPLE, *Justice*, was of the same opinion. I think the rules within the remedies of the act. It is not necessary that the rule of Court shall specify the whole *mandamus*, the officer must return it.

THE COURT ordered the rule to be made absolute, and notice to be given pursuant to the act.

HILARY

HILARY TERM,

The Twelfth of George the Second,

IN

The King's Bench.

*Sir William Lee, Knt. Chief Justice,**Sir Francis Page, Knt.**Sir Edmund Probyn, Knt.**Sir William Chapple, Knt.*} *Justices,**Dudley Ryder, Esq. Attorney General,**John Strange, Esq. Solicitor General.*

Olive against Ingram.

Case 270.

THE QUESTIONS in this case (a) were two : FIRST, Whether a woman be capable of being chosen into the office of *sexton* ? and, SECONDLY, Whether a woman can vote at such election ?

A woman may be chosen *sexton*, and may vote at elections.

S. C. 2. Stra.

1114.

13. Vinet Ala.

159.

IT WAS OBJECTED *against the competency of the sex* on these occasions, that they are under a legal incapacity of bearing public offices of trust ; that they cannot either act personally, or make a deputy ; that a woman is not bound even to take an oath of allegiance, nor can she vote for member of parliament.

ON THE CONTRARY *it was said*, That there was no judgment or experience necessary for performing this office ; and as to their voting, there was no legal restraint, but they are not compellable ; and

(a) This was an action of *assumpsit* for money had and received to the use of the plaintiff, on which a case was made for the opinion of the Court.—THE CASE stated, “ that there was a vacancy in the office of *sexton* of the parish of *St. Botolph without Bishopgate* ; that the plaintiff and *Sarah Bly* were candidates ; that *Sarah Bly* had one hun-

“ dred and sixty-nine indisputable votes, “ and forty which were given by women “ who were housekeepers and paid to “ church and poor ; that the plaintiff “ had one hundred and seventy-four “ indisputable votes, and twenty-two “ other votes given by such women as “ aforesaid ; that *Sarah Bly* was declared “ duly elected.”

the

OLIVE
against
INGRAM.

the reason why they did not vote for members of parliament was, ing in they were not contributory to the expences, the heir com- because the place of the ancestor, and not from any legal restraint.

To support the former opinion were cited, 2. *Inst.* 17. 2. *Cro.* 18. 1. *Inst.* 107. b. *Litt.* 379. 1. *Cro.* 389. 1. *Sid.* 355. 1. *Vent.* 105. *Vaugh.* 181. 4. *Inst.* 4, 5. For the latter, *Blunt's Tenures*, 47. 3. *Keb.* 32. *Hob.* 143. *Prideaux of Churchwardens*, 35. & 55.

LEE, *Chief Justice*. This may be a very extensive determination, if the usage of not voting has avoided the right of voting only where private property is concerned. The question here is, Whether a woman is to be taken within the general words "of all persons paying scot and lot?" In *Brady's Append.* 35. *Lady Packington* returned two members to parliament to serve in her name. It was said to be declared by the Judges, in the case of *Coates v. Lisle*, in the fourteenth year of *James the First*, that clergymen could not vote. By a collection of *Hakewell's*, in the case of *Catharine v. Surry*, the opinion of the Judges, as he says, was, that a *feme sole*, if she has a freehold, may vote for members of parliament: and by this it seems as if there was no disability: but the nature of the office to be executed may determine this question.

Afterwards, in *Trinity Term*, in the twelfth and thirteenth year of *George the Second*, 1739,

STRANGE, *Solicitor General*, argued, That usage is the only evidence of right at common law; and as their claim is at common law, they ought to shew it, or else *non user* shall be evidence of a waiver of their right, if ever they had any; that in all acts which concern the public, women are put in the same class with infants (a); and elections being already too popular, this would open a door to greater confusion.

BOOTLE *contra* argued, That as they had in general power and capacity to vote, some disability must be shewn to take it from them; that it was a just rule, that those who contributed to maintain the elected should be electors: and he answered the objection of *non user* by the difference between being exempted and being incapacitated.

LEE, *Chief Justice*. I thought this might have been a case of great consequence; but as it depends merely on its own circumstances, it cannot be drawn into precedent. Where the custom was to serve as *constable* by turn according to their houses, it was held, that the custom would oblige an attorney; and there it is said, that if the custom was good, then a woman, if an inhabitant, may, if it come to her turn, be obliged to serve, which the law will not permit (b); but afterwards such a custom to choose by house-rows was held good (c), because a woman may hire a substitute. And this opinion

(a) *Fitz. N. B.* 162.

(b) *Cro. Car.* 389.

(c) *Sid.* 355.

OLIVER
against
INGRAM

does not thwart the case in *Croke*; for though she may hire one, she is still incapable. And in the case of *The Queen v. Hentley* (a), where the question was, Whether a woman could be overseer? it was held not; and the case of *Syd.* allowed to be law (b). But the nature of the office is the true consideration with respect to the person who is to execute it. In the case of *the Town of Chelmsford*, a woman was appointed governess of the house of correction by order in court (c). The first question will turn on the nature of this office. In 1. Vent. 153. the Court were in doubt whether they should treat this as an office: at best it is but a public parish office; and it cannot be considered on a higher foot than governor of a house of correction or gaol-keeper (d). As to the second question, the right of voting in women is to be allowed only *secundum subjectam materiam*; and in the case of *Cotes v. Lisle* (e), that women when sole had a power to vote for members of parliament, was mentioned only to know if anything more could be said or discovered on that and *Hakewell's Collection*; and, in respect that is but a private office, women when sole may vote; but it would be a very different consideration in voting for public officers, which concern the Government. And this is considered as a private trust in the women, they having interest, as parishioners, in these things.

PAGE, Justice. I am of the same opinion as to the principal case. But I see no disability in a woman from voting for a parliament-man.

PROBYN, Justice. This case is divided into two questions, viz. their capacity of holding such an office, and their right of voting. This case is very imperfectly stated, for it does not state an office for life, years, or at will, nor the fees; so that the Court must form a judgment from *sextons* in general. This is a servile ministerial office, which requires neither skill nor understanding; and the case sets forth, that women were rated, and paid rates, but does not say in this parish; and the best rule seems to be, that they who pay have a right to nominate whom they will pay to. But this cannot determine that women may vote for members of parliament, as that choice requires an improved understanding, which women are not supposed to have. The office of *churchwarden* is to take notice of all their parishioners, and of their behaviour, and to make certificates to the spiritual court; and as to the *constable*, the person whom the substitutes is sworn in, and is constable.

CHAPPLE, Justice. It should appear, that she offered herself to this office; and as this is considered as a personal trust, she cannot depute; nor does it appear that women are liable to the contribution for a *sexton*; nor is there any case adjudged that they are

(a) Easter Term, 10. Anne.

(d) 3. Keb. 32. Dyer, 285. Hyl.

(b) But it is now settled, that a woman may be chosen overseer.—See *Rex v. Stubbs*, 2. Term Rep. 395.

148.

(c) 14. Jac. 2.

(e) 2. Ld. Ray. 1014.—See 2. Term Rep. 593.

capable

Office
against
Incumbent

capable of electing; the election of a *lecturer* is nothing but a subscription who shall pay the lecturer.

The case was adjourned for farther argument.

MARSH for the plaintiff. This is a special case made at the *nisi prius* upon an action, &c. for five shillings claimed by the plaintiff, as *sexton* of *Saint Botolph's*, for that the plaintiff, being elected into the said office by a majority of five votes, the defendant obtained a majority, and procured herself to be chosen by getting in women to vote; and upon this case there are two points:

FIRST, Whether a woman may be a candidate for the office of a *sexton*?

SECONDLY, Whether a woman has any right to vote for a *sexton*?

As to **THE FIRST**, This office ought not to be executed by a woman, because it is a *circa sacra*, for the exemptions of people in orders extends to clerks, &c. The case of *Armstrong v. Lisle* (a) shews that such officers must be men, notwithstanding that women are favoured with clergy, and women and sextons named together in the statute 3. & 4. *Will. & Mary*, c. 9. In *Eyles' Case* (b) it is said, that a *sexton* may be a parson; that a *mandamus* lies for a *sexton*; and therefore a woman cannot be a *sexton*. Besides, it is fitted for men to clean and wash the church, &c.; and it would be servile work for a woman to dig a grave, as sextons do; and as to a woman having been governor to *Chelmsford* workhouse, it is but a newly-erected one, and is by consent and voluntary contribution, not *ex provisione legis, sed pactum*.

SECONDLY, A woman ought not to vote for this office. The reason why women vote in the great Companies is, because they are special proprietors. The case of *The Attorney-General v. Nicholson* (c) does not come up to this: there the parson might have had the majority of men, and his adversary might have had the women, for they do not appear to be distinguished. Besides, decency and the policy of the law exclude women from popular elections. They cannot vote for members of parliament, according to the express opinion of my Lord Coke (d). They neither can, nor ever did, vote for a coroner (e). They are not compellable to come to the tourn, or leet, or county-court (f). They are incapable of being chosen constable, unless by custom; for *F. N. B.* 359. shews, that in other cases they cannot be chosen, because they cannot go to the county-court, where constables are chosen. In *The Queen v. Tucker* (g) it was adjudged, that a woman cannot be

(a) Kely. 83. 93. Trem. 20. SKIN.
670. Carth. 394. Comb. 410. Salk.
64. 12. Mod. 108, 109. 159. Holt,
63.

(b) 1. Vent. 143. 2. Keb. 32.

(c)

(d) 4. Inst. 4, 5.

(e) 2. Inst. 559.

(f) Fitz. N. B. 359.

(g)

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overseer of the poor, and accordingly there was a *mandamus* to chuse another (a); and the office of a sexton is a much more improper office for a woman than that of an overseer of the poor; and therefore women ought not to vote.

KETTLEBY for the defendant. Though women are not allowed to wear breeches, it is to be hoped that their petticoats shall not be taken from them; for there is no reason to say that women are not qualified to be sextons, since they are qualified to pay scot and lot, and all poor rates, and to maintain a sexton, and to execute offices, at least by deputy. *Hobart*, 148. says, they may execute the office of constable by deputy. In a Book called *the Mirror of Justices*, a woman is said to have been a justice of the peace. In *Eyles' Case* (b) it is, that a *mandamus* was granted for a sexton, being an office for life, &c. This office is so designed, that a sexton may be of either sex (c); and the duty of the place being to look after the parson's surplices and vestments, and to keep the church clean, it will be better performed by a woman. Neither are women excluded offices *circa sacra*; for in the last of *ROMANS*, verse 1. mention is made of a woman, one *Phoebe*, who is there called the *servant of the church*; she might possibly be in some office analogous to that of a sexton. So female servants or deaconesses are mentioned in antient Councils, when baptism was by immersion. In *Michaelmas Term*, in the second year of *Queen Anne*, a woman was made governor of a workhouse at *Chelmsford* by the justices, and a motion to quash the order was denied, because it might be executed by deputy, as in *Lady Broughton's Case* (d). The statute 3. Geo. 2. c. 33. s. 8. which was made to provide a minister for *Deptford*, enacts, "That all parishioners paying, &c. shall vote, &c.;" and the 3. Geo. 2. c. 3. is to the same effect; and women proprietors always vote in the great Companies. The case of *The Attorney General v. Nicholson* (e) was an information in the exchequer in relation to admitting the minister of *Clerkenwell* parish, wherein it was objected, that women had voted, and that the parson was chosen by a majority of women; but it was adjudged there, that women might vote in that case; and there is the same reason that they should vote in the present case.

LEE, Chief Justice. The question on the first point is, Whether a woman is incapable of being a sexton? It is agreed, that by custom a woman may be constable, and, I believe, churchwarden. As to their right to vote, I do not know that it has ever been determined that they have not a right of voting. And whether they have not antiently voted for members of parliament, either by themselves or attorney, is a great doubt. I do not know upon enquiry but it might be found that they have. But as this

(a) But it is now settled, that a woman may be appointed overseer. *Rex v. Stubbs*, 2. Term Rep. 395.

(b) 1. Vent. 143. 153. 2. Lev. 18. Raym. 211. 2. Keb. 802.

(c) In *Spel. Gloss.* 497. *Du Fresne*. *Skyner's Etymologicon*. *Bailey's* and *Chambers's Dictionaries*, tit. "Sexton."

(d)

(e) *Trinity Term*, 1. Geo. 2.

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case shall be spoken to again, I shall give no opinion at present.

PROBYN, *Justice*. The doubt can only be upon the nature of the office, whether it is improper to be performed by a woman or not? Why is not a woman as capable of taking care of vestments as a man? There occurs to me no incapacity in a woman for this office. Some modern practices have indeed been introduced not so proper for a woman. The other question is, Whether women may elect a sexton? In elections for members of parliament, women are not now admitted, whatever they were formerly; but in parishes, why should not they have a right to chuse those whom they help to maintain? That they are not allowed to vote for members of parliament is upon another reason, because of the judgment required in it; which does not hold in the choice of a sexton. In this case, women voted on both sides, which is an admission to their right. When women are chosen constables, they must take upon them that office, or they are punishable, and they must go to the tourth, &c. to be sworn, or to a justice. So of the office of churchwarden, overseer, &c. which is a greater office. Neither do I see any reason why they should not have a right to vote. And that case in the exchequer which has been cited must have been determined by the votes of a majority of women, or it had been no case at all; and I think she cannot be compelled to take that office.

CHAPPLE, *Justice*. The question, Whether a woman may be an elector? is the greatest difficulty. And I think, that where women cannot take an office, they ought not to chuse such office. Nor can a woman be made a constable but under custom; and where there is no such custom, I think she cannot be compelled to take that office.

LEE, *Chief Justice*. In *Lady Packington's Case*, *Brown Willis* returns to parliament, that the sheriff made a precept to her, as lady of the manor, to return two members to parliament.

But let this be spoke to again; which was, in *Hilary Term* 1738, as follows:

DENNISON *for the plaintiff*. Two questions have arisen in this case: FIRST, Whether a woman is capable of executing the office of a sexton? SECONDLY, Whether women are capable of voting for such an office as sexton?

FIRST, Women are not admissible into the office of sexton. First, Because it is a trust; secondly, Because it cannot be performed by deputy; thirdly, Because it is of a public nature. The business of a sexton is to keep the keys of the church, the sacred utensils, the holy vestments, &c. In some places it is his duty to dig the grave and to ring the bell. No authority has been produced to shew that women are personally admitted to public places.

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places (a). It is said in *Prowse's Case* (b) that a woman cannot be a constable, even by custom. So in *Sir Walter Baynes' Case* (c), it is said, that a woman must make a constable to serve for her, and that a custom for her to serve in person is not a good one. The statute 43. Eliz. c. 2. implies that women cannot be overseers (d). Indeed a woman governed the workhouse at *Chelmsford*.

LEE, *Chief Justice*. That case of *Chelmsford Workhouse* is in the third volume of *Salkeld's Reports*, which has not been admitted to be of authority here; but I have searched the record, and it there appears that she was made governess of a workhouse; but I do not find in the crown-office that the Court made any rule upon it.

DENNISON. It might be a woman's workhouse; and there is no other case to shew that the law permits either women or clergymen to hold places of public trust and duty (e). There does not appear to be a custom in this parish to make a deputy, therefore it must be taken to be on the general rule of law, that officers of trusts cannot make deputies (f). The office, in this case, differs from those which women have by inheritance. This election is void because she is unfit for the office, and is *persona minus idonea*. A person unfit for an office cannot make a deputy, for there is no principal. Women cannot take the oath (g); her husband swears; and there is an oath of office stated in this case.

The next question is, Whether women can vote? They cannot vote for a member of parliament (h), neither can infants (i); their voting for parochial offices is a new thing (k). In some parishes they pretend to vote for lecturers, as they did in the case of *The Attorney General v. Nicholson*, but it does not appear but that the majority might be men; and a lecturer is not a public officer but a private; for the rector can refuse him the pulpit (l). Women having offices by inheritance, tenure, &c. is not like the case of a public office by election. This is an office which requires experience and skill. Women being patrons is not like this case. A woman must be capable of being chosen before she is capable to vote, else it is begging the question. In great companies women vote as proprietors; nothing can be inferred from their voting for churchwardens. Sometimes women are not included in the general words of "all persons, &c." in statutes. The fact that women are not compelled to come to the tourn, implies that the law was that they ought not to come. The fact of women having voted for a lecturer is no proof that they have any right to do so, any more than in the present case.

(a) Lord Coke in his *Magna Charta*, 2 Inst. 17.; and *Lady Russell's Case*, Cro. Jac. 18.; and the *Countess of Pembroke's Case*, Co. Litt. 107. b.

(b) Cro. Car. 389.

(c) 1. Sid. 355.

(d) But see 2. Term Rep. 395.

(e) 1. Vent. 105.

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(f) Vaugh. 181. Litt. C. 379.

(g) 2. Inst. 121. Litt. sect. 87, 88.

(h) 4. Inst. 4, 5.

(i) See statute 7. & 8. Will. 3. c. 25.

(k) See the statute 3. Geo. 2. c. 3. and

33.

(l) See *Rex v. Field*, 4. Term Rep.

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WYNNE, *Serjeant, for the defendant.* As to THE FIRST POINT, there is no incapacity in women to execute such an office, for it is properly a service. Women may execute such an office in person; they may be guardians, administrators, executors, and take the oaths of office. Women may make contracts of marriage; and there the law presumes them to be riper two years sooner than men. *Lady Boughton (a)* was turned out of the office of keeper of a prison, but not for incapacity, but for misbehaviour, and that was an office where they return writs, &c. and then the law was in *Latin*. Ladies may guard castles, &c. Women have held by military tenures (*b*). In *Pegu (c)* there is a grant of a castle to a lady. Women have performed very high offices (*d*). Clerks have held by knight's service (*e*). The office of champion at the last coronation was in a woman, who applied in that case to the crown to make a deputy (*f*). The office of clerk of the crown in the king's bench was granted to a woman (*g*). The office of high constable has been born by a woman (*h*). The law allows women to be even queens; her late majesty QUEEN CAROLINE was left regent and guardian of this realm. Women are patrons of churches; they have donatives, and there they are as ordinary; they are capable of impropriations, which are *circa sacra*, and they are regarded in law as parsons; many nunneries had them before the Reformation (*i*). Persons incapable may make a deputy in this case (*k*) notwithstanding. A woman, one *Alice Pater Noster*, held by saying a prayer (*l*), whence she had that name; and surely that is *circa sacra* with a witness. Women in necessity have been allowed to baptize. In an old edition of the *Testament*, in the year 1574, a woman is called "a minister of the church (*m*)". Quakers allow women to preach.

THE SECOND POINT is, Whether they can vote in favour of a candidate for this office; and if they can execute it, *a fortiori* they may vote in an election for this office. No authority has declared them incapable, and their forbearance is no argument; for there is not one man in twenty that goes to a vestry. Women vote in great companies: they ought to vote who pay (*n*) the rates.

DENNISON *in reply.* The citations from *Lord Coke (o)* and *Fitzherbert (p)* are only that a woman cannot be distrained to come to the tourn, but they do not say that they must not come, only that they cannot be forced to come; and that is where there is no other land of the heir. The writ directs to chuse *indoctum par-*

(a) *Lady Boughton's Case*, Lev. 3. 3. Keb. 32.

(b) *Blount's Tenures*, 47. See also *Prynne on Co. Lit.* 221.

(c) *Page*, 215.

(d) *Co. Lit.* 107.

(e) *Co. Lit.* 99.

(f) *Co. Lit.*

(g) *Shower's P. C.*

(h) *Dyer*, 285.

(i) *Dugdale*,

(k) *Hob.* 148.

(l) *Blount's Tenures*, 51.

(m) Last chapter of the Epistle to the Romans. First Book of Kings, chap. ii. "The child Samuel ministered, &c."

(n) *Dr. Prideaux' Office of Churchwardens*, sect. 35. 55.

(o) 4. Inst. 5.

(p) *Fitz. N. B.* 168. 355 359.

Momentum (a). The reason why women do not vote in certain cases is, because they are exempt in such cases from contributions; but here they contribute to pay scot and lot, and are therefore, by parity of reason, as well intitled to vote as men (b). It is an argument *à fortiori* in this case, that if a woman can vote for a *lecturer* she may vote for a *sexton*, who is but a servant to the parish.

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LEE, *Chief Justice*. This case may be very extensive in its consequences, though not in itself. The usage has been to avoid any woman's voting, except in companies, &c. therefore I think it proper to take further time in this case upon account of its importance.

CHAPPLE, *Justice*. Where an act of parliament impowers all persons to vote, &c. it should, I think, extend no farther, though the words are very general, than to those who may lawfully vote.

LEE, *Chief Justice*. I have seen a manuscript treatise (c) which says, that it was THE JUDGES opinion, that the clergy had no right to vote for members of parliament. In the case of *Holt v. Lyle* (d) it is determined, that a *feme sole* freeholder may claim a voice for parliament men, but if married her husband must vote for her. A woman has been returning officer (e). A sexton's office is rather a service than an office. It has been adjudged that women may have the office of gaoler (f). But I would have this stand over for further consideration.

PAGE, *Justice*. Her capacity to hold and execute one office does not make her capable of holding and executing another.

PROBYN, *Justice*. An excuse from acting, &c. is different from an incapacity of doing so. The case of *Holt v. Lyle*, mentioned by my LORD CHIEF JUSTICE, is a very strong case.

LEE, *Chief Justice*. I would not be understood to declare it to be my opinion that women may vote for members of parliament; I only mention what I found in a manuscript by the famous *Hakewell*, but give no opinion at present, because I would further consider of this matter. I should be glad of another argument upon this.

Let it be spoken to again: and it was spoken to again in *Trinity Term* 1739.

MR. SOLICITOR GENERAL for the plaintiff. This question comes before your lordships upon a case which was made at the

(a) Prynn on 4. Inst. 13. 32.
4. Prynn's Brevia Parliamenti, 431.

(b) The Serjeant cited the case of an information by the Attorney-General at the relation of *Fuller*, in which men and women had voted promiscuously; but the Chief Justice said, that case could not be adduced as any authority in

the present case, because the question respecting the right of the female voters had not been raised in it. MS.

(c) Hakewell's Mod. Ten. Parl.

(d) 4. Jac. 1.

(e) Brady's Appendix to his History of Boroughs, 35.

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Sittings in *London, &c.* Upon the former arguments two points were made, FIRST, Whether a woman can be a sexton? SECONDLY, Whether she can vote for one?

As to THE FIRST POINT, every thing having been already said upon it; I shall not trouble the Court upon that, though I do by no means waive it.

THE SECOND POINT is a question of great consequence; for the same reason which allows women to vote in this case, will extend their vote to many other instances. The office of sexton is a public office, and it is upon that foundation that a *mandamus* was granted for it, in *Eyles' Case* (a). The novelty of this claim can be the only reason that there are so few authorities to this point. In 4. *Inst.* 5. it is agreed, that women cannot vote for coroners, or members of parliament, though they are freeholders. Upon the former argument it was insisted to be in case of women that they did not vote for members of parliament, and that therefore they were not obliged to pay them their wages; but it appears by *the Registers*, 192. a. that they did pay wages, for they were to be levied *de communitate comitatus*. The policy of the law has thought women unfit to judge of public things, and placed them upon a footing with infants (b); they do not go to court leets, and cannot be outlawed, but must be waived (c). In the case of *The Attorney General v. Nicholson* (d) it does not appear but that there might be a majority of men for the person elected; and a lecturer is no public officer; he may be removed at the will of those who please to pay him; and is a private election. *West* (e) says, that all fiefs were originally masculine, and women were excluded from the succession of them because they cannot keep secrets. *Mr. Serjeant Wright* (f) shews, that a woman is excluded from military tenures and from councils, *quia quæ audit reticere non potest*. It has been adjudged that women cannot be overseers of the poor, though substantial householders. By the 7. & 8. *Will.* 3. c. 25. f. 8. infants cannot vote, and women are perpetual infants. Where *Magna Charta* gives a woman trial *per pares* it is by men, whether lords or commoners; and for these reasons women ought not to vote, &c.

BOOTLE for the defendant. The law has certainly in several cases given greater privileges to men than to women; and it is true, that a woman cannot be a pastor by the divine law (g); but this is an office which may be executed by any person whatsoever, and requires no capacity or judgment at all; and it has been greatly doubted (h) whether it be an office at all, or only a service. A woman may be a constable by hiring a deputy (i), and there is the same reason she should be a

(a) 1. Vent. 143. 2. Lev. 18.

(b) 4. Inst. 45.

(c) Co. Lit. 722.

(d) Trinity Term, 1. Geo. 2.

(e) *West's Inquiry into the manner of creating Peers.*

(f) *Wright's Tenures.*

(g) *Colt v. Glover*, Hob. 143.

(h) 1. Vent. 153. See also 1. Lev. 18. which seems to be the same case.

(i) *Sir Walter Bayne's Case*, 1. Sid.

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sexton, and stronger; for a constable is to keep the peace, and to do other acts wherein the public is concerned, which are no part of a sexton's office. That women cannot perform the services annexed to military tenures, or have quarantine out of the *caput baroniae*, &c. are absolutely foreign from the present case. Women have executed more important trusts than the present: a woman has born the office of high-constable of *England* (a); a woman has been a free suitor to the lord's courts (b), and shall be admitted to do homage and fealty (c). Incapacity shall not be presumed, and it is not proved by *non user*; and women polled on both sides in this case, &c.

LEE, *Chief Justice*. This case is of great importance in its consequences and influence. In *Cro. Car.* 389. where it became a question, whether a woman should serve the office of constable in her turn, it was held that she was incapable; afterwards, in *Siderfin*, there was a determination which avoids that, upon the principle of her appointing a deputy, and so does not thwart *Cro. Car.* 389. In the case of *The Queen v. Henley* (d), two persons were nominated for the justices to chuse an overseer; one of them being a woman, they refused; and upon a motion for a *mandamus* to them, the Court held that they did right in refusing it (e). In the present case the nature of the office must be the consideration. In *Lady Boughton's Case* (f) a woman was allowed to be keeper of the *Gatehouse*. The nature of a sexton's office is pretty well known, though it differs in different places; it must be now considered as an office, though the Court doubted of that at first, till they were certified of its being an office for life, &c. Women are certainly excluded from tenures merely masculine or military. As to the question in respect to women's right of voting, I think that very much depends upon the determination of the first question. This question must be determined singly upon the foot of the common law, without regard to the usage of parishes in *London*: the case is defectively stated in not stating that the women, being householders and rated, were unmarried; but in this case they must be taken to be so. What inclines me to think that they may be admitted to vote in this particular instance is, that the sexton's duty seems to be in the nature of a private trust, he having only the custody of the *bona parochianorum*, &c. and it does not seem a thing of a public consideration, in which I incline to think women have not a right of voting, though they are not positively excluded.

PAGE, *Justice*. I am of the same opinion, and that the votes are good votes, and that she is capable of the office, &c.

PROBYN, *Justice*. This case does not state whether this is an office for life, years, or will, and what the fees of it are, so that it is imperfectly stated. Sextons in different parishes have different

(a) See Vaillan's edit. Dyer, 285.

(b) 2. Inst. 119.

(c) Fitz. N. B. 257.

(d) Easter Term, 10. Ann.

(e) But see *Rex v. Alice Stubbs*,

2. Term Rep. 395.

(f) 3. Keb. 32.

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duties; so that, as this case is stated, I do not see that it will influence any other case of a sexton. It is a ministerial or servile office in general. Is there anything in it that requires skill or judgment, or that a woman cannot do as well as the wisest man in the parish? It rather requires strength. This case does not state, that the women who are rated and pay, do so to this parish, so that it can only be taken by implication; and they who pay persons ought to chuse those persons, for they who pay ought to chuse whom they will pay. I cannot see how this will extend to any superior office, as members of parliament, military employs, &c. A constable was once a great peace officer, how contemptible soever he may be thought at present. This is an inferior office, and was not held to be a public one without some difficulty; and this case stands distinct from other cases of offices, upon its own particular circumstances. This is my opinion as at present advised, saving I may be convinced by better reasons.

CHAPPLE, *Justice*. It were to be wished that this case had been better stated. As to the nature of this office, it is various in different places. Women are in many respects in law, as well distinguished from infants as men, being *sui juris* till they are married. Though it is not stated in this case that women have paid, yet they are liable to rates; but that does not give them a right of electing to other offices. The case of *The Attorney General v. Nicholson* is no authority in this case, for the office of lecturer is at will; therefore I should be willing to take a day or two to consider this, if MY LORD CHIEF JUSTICE pleases; but if my Lord is satisfied, this is my opinion at present.

LEE, *Chief Justice*. I think this differs from all other offices, and can extend to no other; I do think this must only be considered as a private thing. The judgment must be, that the plaintiff must pay the costs of her nonsuit.

Case 271.

Vaughan against Brown.

To debt as executor, if the defendant plead judgment recovered by way of retainer, and no assets ultra, and the plaintiff reply "executor de son tort," the defendant may rejoin, *per darrain continuance*, that he is administrator^(a)
S. C. 2 Spr. 1706.
S. C. And. 328.

DEBT brought as executor. The defendant pleaded, that he had recovered two hundred and forty pounds upon a judgment in the common pleas, *et nil assets ultra*; to which the plaintiff replied, that the defendant was executor *de son tort*; and then the defendant pleaded, after the *last continuance*, that he was administrator; and to this plea, as administrator, the plaintiff demurred.

Two questions were now argued;

FIRST, Whether an executor may retain without proving himself lawful executor? And to prove that he could not, was cited 1. *Mod.* 308. wherein the plaintiff declared against the defendant as executor, who pleaded that he took upon him the burthen of

(a) See *Curtis v. Vernon*, 3. Term Rep. 687.

the will, and retained so much for a debt due to him, and that he had no other assets; the plaintiff demurred, because it did not appear that the defendant was not executor *de son tort*, who cannot retain; and judgment was given for the plaintiff; and *Coulter's Case (a)*, that an executor *de son tort* cannot retain.

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SECONDLY, Whether this second plea, *puis darrein continuance*, was not a waiver of the first? and to prove that it was a waiver, cited *Cro. Jac. 26. Hob. 81. Co. Ent. 517. Rast. Ent. 549. Moor, 871. Salk. 178.*

FOR THE DEFENDANT it was answered,

FIRST, That if an executor may not retain without proving himself lawful executor, yet an administrator may retain, 1. *Roll. Abr. 922. 2. Roll. Abr. 684. 1. Brownl. 75. Bond v. Green.*

SECONDLY, That the defendant's plea of administrator is not a waiver, *Peirce v. Paxton (b)*, *Williamson v. Norwich (c)*, and agreed in 2. *Vent. 180. 1. Roll. Abr. 923. 2. Roll. Abr. 554. pl. 2. 4.*

LEE, Chief Justice. The declaration in this case is against the defendant as executor generally; he pleads a judgment, and thereupon insists upon a right of retainer; and the plaintiff's replication is, that the defendant is executor *de son tort*; and so it stands upon the pleadings. The plaintiff's replication has certainly avoided the defendant's defence; for an executor *de son tort* cannot retain. Then the defendant has pleaded, as administrator, a plea *puis darrein continuance*, and the administration taken out afterwards will so far purge the original wrong as to enable him to retain a just demand; but if it was obtained after the action, it cannot abate the plaintiff's suit. Where there is an original plea, and a plea *puis darrein continuance*, the second waives the first, except where there is a demurrer, *Hob. 81.* though contradicted in *Salkeld*; but if this kind of contradictory plea were to be allowed, it would be very much to the prejudice of the plaintiff.

PAGE, Justice, inclined likewise to allow the demurrer, and cited *Forrest v. Ballard (d)*.

PROBYN, Justice. None of the cases cited came up to this, as it stands upon the pleadings. A plea *after the last continuance* is a waiver, but the return of this is because it consists of different and contrary matters; but it is not a waiver, because it is a new defence, if it can be made consistent, and if the plaintiff can rejoin to it. The first defence in this case is as executor, the second as administrator; and whether these are inconsistent or not, I am at present in doubt.

(a) 5. Co. 30. Cro. Eliz. 630.

(c) Stiles, 337.

(b) 12. Mod. 541. 1. Ld. Ray. 691.
Holt, 360.

(d) Cro. Eliz. 810.

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CHAPPLE, *Justice*. The difficulty with me is, whether the plaintiff is not precluded by this defence. It is hard if a man has a true defence, that he must not plead it; and though at the time of the first plea the defendant was executor *de son tort*, yet his administration is a matter of fact subsequent, and they seem to me to be but in the nature of one defence; and it is a rightful one if it be well pleaded, which is the matter now in question. And I am in some doubt, whether the defendant could have pleaded any otherwise, or whether the plaintiff can take any advantage of this to give any answer to it: but I am not satisfied that the pleading is bad (*a*).

LEE, *Chief Justice*. The damage to the plaintiff, if he cannot controvert the judgment, is the material consideration; but if it cannot be shewn that the plaintiff can controvert this judgment, and that he is not precluded, I think it is. But let this be spoken to again.

BARRETT *for the plaintiff* (*b*). This is an action of debt upon bond for forty pounds, to which the defendant has pleaded a judgment in the nature of a retainer; the plaintiff replies, that he is executor of his own wrong; the defendant, after the last continuance, pleads administration; to which the plaintiff demurs, and there is a joinder in demurrer. The defendant cannot retain in this case as tortious executor (*c*). After the last continuance nothing can be pleaded without leave (*d*). New matter cannot be pleaded after the last continuance (*e*). It is the defendant's *laches* not to have taken out administration sooner (*f*). *Laches* shall prejudice widows or infants (*g*). And this is the defendant's *laches* at the time of the first plea (*h*). This last plea is a waiver of the first, because a man cannot have two bars at common law (*i*). *Hob.* 81. is denied in *Palmer v. Barber* (*k*). These pleas are inconsistent with each other. There is a distinction between executors and administrators (*l*). This last plea cannot stand with the first. A person, to enable himself to retain, ought to entitle himself to the executorship, which the defendant has not done upon these pleadings (*m*). If the first plea is waived, the second cannot stand, and is in abatement, so cannot be pleaded in bar as first (*n*). When a second plea contains matter not pursuant to the former, and which does not fortify it, that is a departure. Administration does not relate in all cases (*o*).

(*a*) Skin. 274. Salk. 296. Moor, 126. pl. 273.

(*b*) In Hilary Term, 1738.

(*c*) 1. Roll. Abr. 927. Yelv. 137. Bonlister's Case, 5. Co.

(*d*) Reg. Pla. 63. Hale's Analysis, 158.

(*e*) Bro. Abr. "Continuance" 168.

(*f*) 5. Co. 88.

(*g*) Bro. Abr. "Laches" 57. pl. 14. Co. Lit. 32. b. 131. a.

(*h*) Stiles, 337.

(*i*) Bro. Abr. "Waiver" 320. pl. 23.

(*k*) Salk. 178.

(*l*) Plowd. 280. 2. Inst. 397.

5. Co. 28.

(*m*) 1. Mod. 208. 1. Vent. 303.

1. Roll. Abr. 907.

(*n*) Salk. 296. 2. Leon. 190.

(*o*) Co. Lit. 150. 2. Vent. 180. Salk. 297.

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Hob. 49. is a strong case for the plaintiff. The plaintiff is hereby precluded of his defence. This differs from the case in *Stiles, 337.* because there the plaintiff was not hindered from his defence, as he is now; and a demurrer admits nothing but what is well pleaded. And therefore judgment was prayed for the plaintiff.

HASSELL for the defendant. Though tortious executors cannot retain, yet certainly administrators may retain (a). This is not a departure, but a strengthening our plea. *Co. Lit. 304.* is the case of rejoining a feoffment, where the plea was a lease and release. They cited *Atkinson v. Rawson (b)*, that tortious executors cannot retain, which is not our case. The defendant has not pleaded executorship, but a judgment; and this fortifies his plea of a right to retain. *Williamsen v. Norwich (c)* is the same case, and expresses to this. And administration purges the wrong in this case, and relates to the intestate's death (d). The case of *Sir Thomas Cockin (e)* is a plea after the last continuance. 2. *Vent. 179.* is not like this case. *Boulter v. Ireland*, in *Moor, Coke, and Cro. Eliz.* is, that tortious executors cannot retain. *Moor, 871.* and *Hob, 81. or 84.* do not relate to this case. The case of *Baker v. Palmer (f)* does not affect us, because we only waive our executorship. We have not been guilty of any laches, for administration is a judicial act. *Stiles, 337.* proves, that an administrator may retain in this case. In this case, both administrators and executors may retain. Administration relates to the intestate's death in the present instance. *Hob. 49.* does not extend to us. And therefore it was hoped that the defendant might have judgment.

LEE, Chief Justice. If this were a matter existing at the time of the first plea, it could not be pleaded after the last continuance, or if there were any laches in the defendant which were made apparent to the Court. I do not see but this plea is properly pleaded, &c. This is an action of debt upon bond brought against the defendant as executor; he pleads a judgment due to himself upon which he has recovered; and so justifies by way of retainer, &c. If this stood only between the parties, the defendant must be taken to be lawful executor. Then the plaintiff in his replication discloses, that the defendant is a tortious executor, which avoids his plea of retainer; for doubtless an executor *de son tort* cannot retain, because he shall take no advantage of his own meddling without a lawful authority. *g. Rep. Coulter's Case.* Then the defendant rejoins after the last continuance, that he is administrator. The law is, that where there is a meddling as executor *de son tort*, administration afterwards granted purges that tort; as in *Payn's Case (g)*. It is true, that a subsequent administration shall not abate the plaintiff's suit, because he could not call him by any

(a) 1. Roll. Abr. 922. 1. Brownl.

(d) 2. Roll. Abr. 339.

(b) 1. Mod. 208. 2. Mod. 51.

(e) Cro. Eliz. 49.

(f) *Stiles, 337.*

(f) Salk. 178.

(g) *Stiles, 337.*

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other name than executor ; but it enables the party to retain. The difficulty is, Whether the defendant's plea is not such an admission of his being executor as to prevent his plea of administration, as inconsistent ? And it does not seem to me to be inconsistent ; for the plea in this case must be taken in the same sense with the declaration. I know no rule in law that pleading matter after the last continuance is a waiver, unless it is other matter, as in the case of *Barber v. Palmer*, in *Salk.* which was a different defence. *Hob.* 81. is denied in *Salk.* These were pleas inconsistent with each other, which the present case is not, for there seems to me no inconsistency in it, or what amounts to a waiver. There is an objection, that the plaintiff is deprived of the benefit of controverting this judgment ; but there appears to me no default in the defendant, for the plaintiff before his reply might have traversed the judgment, if he had thought fit. And I do not see what other method the defendant could have taken. But before I give my opinion, I should be glad to look a little into the authorities, a great number of which have been cited in this case.

PAGE, *Justice.* I do not think it a waiver in this case, the substance being the same ; it is only a continuation of the same defence. The tortious executorship is purged by the administration ; and, as I take the matter at present, I think it is well enough : but I desire to consider further of it.

PROBYN, *Justice.* The plaintiff might have replied in this case, that the judgment was by fraud, that there were assets *ultra* ; but he makes another case, and puts the defendant under a necessity of supporting his plea ; in which he has only set the whole of the case before the Court ; and that amounts but to one defence. If it had been a difference from the first, and inconsistent with the plea, it had been ill ; but I think it very consistent ; and the plaintiff himself has put his case upon the rightful executorship. This cannot be said to be the defendant's *laches*, for administration may be disputed ; and it is not to be obtained immediately upon application. The next question is, Whether this is a departure ? I rather think it a confirmation of the plea. I incline to think, the plaintiff might take issue upon the whole of this, as it makes but one defence. The cases seem, upon these principles, to be well reconciled. But if my Lord pleases, we will look further into the cases ; though there seems to me to be no great doubt.

CHAPPLE, *Justice.* The grant of administration is the act of the ordinary, and sometimes takes up a great deal of time ; so that there appears no *laches* in the defendant. There seems to me to be no waiver or departure from the matter of defence. The defendant admits his executorship according to the plaintiff's declaration, and does not directly admit that he has proved the will, &c. which would be another consideration if he had. Administration relates to the intestate's death, and purges the precedent wrongful executorship, though administration *pendente lite* will not abate

abate the plaintiff's writ. *Styles*, 337. 1. *Roll. Abr.* 923. *Sid.* 76. 1. *Keb.* 285. This is no departure or waiver of the bar, but a defence of it. Where the plaintiff replies that the defendant is executor of his own wrong, shall he be prevented from defending himself? And it would be hard that the defendant should not have his judgment in this case.

VAUGHAN
against
BROWN.

LEE, *Chief Justice*. Upon the whole of this record there appears no title for the plaintiff. Let there be judgment for the defendant, unless cause be shewn before the end of Term.

N. B. The plaintiff did not think proper to shew cause.

The King against Gardner.

Case 272.

THE DEFENDANT was convicted before a justice of the peace upon the statute 5. *Anne*, c. 14. for that he kept a gun contrary to the statute, being an engine to destroy game; which charge the defendant confessed before the said justice of the peace. And exceptions being taken to this conviction,

A penal information on 5. *Anne*, c. 14. charging that the defendant "kept a gun contrary to the statute, being an instrument to destroy game," is not maintainable, although the conviction state that the defendant confessed the charge.

STRANGE, *Solicitor General*, for the plaintiff, strongly insisted upon the defendant's confession; and argued, that the keeping a gun to kill game was within the statute; and that the words of the act (sect. 4.) being in the disjunctive, "keep or use," the doing either one or the other was a sufficient offence within the statute.

S. C. 2. *Self*. Cases, 385. S. C. 2. *Sura*. 1098. S. C. *And*. 255.

DENNISON for the defendant excepted against the conviction, and insisted, that the charge against the defendant being insufficient, his confession of it must be so too: that the charge in this conviction is no offence against that act, or any other, viz. that he kept a gun, being an engine to destroy game; and therefore it might as well have been said, he kept a cane contrary to the statute, being an engine to destroy game; for it does not appear that he actually did kill any game. And to charge only that he kept a gun is improper, for it includes every man that keeps a gun. And the conviction only saying, that he kept a gun contrary to the statute, being an engine to destroy game, these latter words are but in the nature of a description, and limit the former ones to those only who make that use of it: that a gun is not properly an engine to destroy game, unless it is put to that use, but it is for the defence of a man's house, as well as a sword, which might perhaps be applied to destroy game. The statute 22. & 23. *Car.* 2. c. 25. does not mention guns, but that word is properly omitted in the statute 5. *Anne*, c. 14.; for this act can only mean such instruments as are merely applicable to destroy game, as inares, &c.; otherwise any man who has a gun may undergo the same conviction.

LEE, *Chief Justice*. There is great weight in the objection to this conviction. The word "gun" is omitted in the fourth clause of this statute of 5. *Anne*, c. 14.; and the general words of this act are not extensive enough to take in every instrument for the destruction

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struction of game, but such only as is expressly used for and applicable to the destruction of game, and perhaps to no other purpose. And they do not extend to prohibit a man from keeping a gun for his necessary defence, but only from making that forbidden use of it. And the word "gun" being purposely omitted in this act, the defendant is not within the penalty.

PAGE, *Justice*, of the same opinion.

PROBYN, *Justice*. The objection that the defendant has confessed this charge has been well answered, for the confession can be carried no farther than the charge itself, and that being insufficient the conviction ought to be quashed. The engines prohibited by this act must be such as are kept on purpose to destroy game; and it must appear by evidence that they have been so used, to bring the offence within the statute 5. *Anne*, in which the Legislature did purposely omit the word "gun," because farmers are generally obliged to keep a gun, and are no more within the act for doing so than they are for keeping a cabbage-net; the conviction ought to be quashed.

CHAPPLE, *Justice*, of the same opinion; and that the reason the words of the act are in the disjunctive, "keeping or using, &c." is, because people use other folks dogs; and if they do, they are within the act. And the keeping of them must be averred to be on purpose only to destroy the game.

LEE, *Chief Justice*. The conviction must be quashed (*a*).

(*a*) See *Rex v. Filer*, 1. *Stra.* 496. 683. *Avery v. Hoole*, *Cowp.* 825. *Wingfield v. Straiford*, *Sayer*, 15. *S. C.* *Rex v. Hartley*, *Cald.* 175. *Rex v. 1. Will.* 315. *Rex v. Hunt*, *Dough.* *Thompson*, 2. *Term Rep.* 18.

Case 273. The King against Morgan Edwards, Esq. High Sheriff of Montgomery.

An information prayed against the Sheriff of Montgomery, for refusing, after notice, to keep his prisoners in the New Gaol; but the information was refused.

ON MOTION to make absolute a rule for an information against the defendant for a misdemeanor, in not keeping his prisoners in a new gaol built in the town of *Montgomery*, though he had notice from the justices that it was fit, and for keeping the prisoners committed to his custody in a house he hired for that purpose;

SIR THOMAS ABNEY, MR. SOLICITOR GENERAL, and MR. HALLINGS, in support of the information, insisted, that the statute 11. & 12. *Will.* 3. had been well pursued by the justices; that THE GRAND JURY of sessions and at assizes are empowered thereby to make presentments relating to gaols, &c.; and that the statute of *Henry the Eighth* had made *Montgomery* a county town: that this new gaol has been built a year and a half: that by the common law telons are to be kept in the county gaol, where there is one, "in the common county gaol" by the statute 5. *Hen.* 4. c. 10. which, according to my *Lord Coke*, is but declarative of the common law: that

that by the statute 11. & 12. Will. 3. felons shall not be imprisoned but in the common county gaols; and 6. Geo. 1. c. 19. has made that perpetual, and has enlarged the power of the justices: that the key of this new gaol had been properly tendered to the sheriff by order of the justices: that the only way in which they could proceed in this case was by application to this Court: that they had acted only conformable to act of parliament, that sheriffs are bound by law to take notice of common county gaols. The justices say that this gaol is fitting, though those who are not judges may say otherwise. It is sworn, that the place in which the sheriff kept the prisoners is an improper one, and justices can only commit to the public county gaol.

THE KING
against
MORGAN
EDWARDS, Esq;
HIGH SHERIFF
OF MONTGOMERY.

TO WHICH it was answered, by HAYWARD, Serjeant, WILBRAHAM, and TAYLOR, That the defendant denies by affidavit that the house is hired, or any rent paid for it: that the statute of 11. & 12. Will. 3. is, that in case the common gaol is insufficient, upon a presentment by the grand jury, there arises a jurisdiction to the justices. Here they have not produced any presentment, orders, &c. to prove a proper jurisdiction; neither do they so much as shew that the old gaol is not sufficient, or that the new one is a public county gaol: that by the 14. Edw. 3. c. 10. sheriffs have the custody of gaols; and being answerable for their prisoners, may keep debtors where they please: that it does not appear what authority the person had who tendered the key to the defendant: that the place where the defendant now keeps his prisoners is a usual and commodious place: that this new gaol did not appear to be sufficient to hold and keep the prisoners, but that it was so damp in the plaistering, &c. that it would have been murder to have removed them to it: that the water comes into this new place, and the walls of it are such that the prisoners may easily escape: and so the sheriff might have been censured, as others have been, if he had removed them thither: and that this is an improper application, because the Court will not try a right in a criminal way.

LEE, Chief Justice. There is no act of parliament which appoints committing to the county gaol, but only to the common gaol. By the 11. & 12. Will. 3. power is given to justices relating to gaols upon presentments. It does not appear to be a gaol within this statute, for the presentment is not before us. And though some affidavits say there is no common gaol, yet it appears there is one used as the common gaol of the county; and you must therefore shew this to be such a gaol as the sheriff is obliged to carry felons to, in which you have failed. If you had pursued the statute strictly, to be sure, the sheriff must have by law carried his prisoners to it: and then he is within the jurisdiction and order of the justices. But upon the whole, I do not think this such a case as we ought to proceed upon by information.

PAGE, Justice, of the same opinion. *Quæst.*

PROBYN,

THE KING
against
MORGAN
EDWARDS, ESQ.
HIGH SHERIFF
OF MONTGOMERY.

PROBYN, *Justice*. The rule ought to be discharged. There ought to have been a presentment. There was no gaol, or if there was it was inconvenient. Sixty years use of a house for a prison, as in this case, was sufficient to nominate it a county gaol. The court of grand sessions having a jurisdiction, application may be made there; which is a further reason for discharging this rule.

CHAPPLE, *Justice*, of the same opinion.

Case 274.

Thrustout against Grey.

Quere, Whether the king can license one person to build a lighthouse on another's soil; or if a person erect a lighthouse on his own soil, it is a cession of the land to the crown.

IN AN EJECTMENT brought for certain cottages, otherwise light-houses, in *Wintertown*, in *Norfolk*, THE JURY found a special verdict, containing the several patents under which the said light-houses were erected, &c.

Two questions arose on this special verdict.

FIRST, Whether the prerogative of the crown extends to license a person to build a lighthouse on another's soil without the owner's consent (a)?

SECONDLY, Whether the grantee of a licence to erect light-houses does, by building one upon his own ground, make a cession of the land to the crown?

CLARKE for the plaintiff argued, that the prerogative does not extend to license a man to build on another's ground. Beacons, indeed, cannot be erected without the king's licence (b); and at common law, none but the king may erect sea-marks (c). But there is only one instance of a general power to build sea-marks,

(a) *Quere*, Whether the king can grant to another power to erect light-houses, &c. upon my ground, or build one there himself, without my consent? See 1. Inst. 148. *verf. fin.* 3. Inst. 204. b. Grotius, lib. 2. c. 3. f. 14. Molloy, lib. 2. c. 16. f. 5. 2. Roll. Abr. 171. (E.). pl. 4. 3. Br. tit. pl. 12. Moor, 474. Huddy v. Wellhouse. Cro. Eliz. 462, 463. F. N. B. 225. E. 12. Co. 13. Bro. tit. Patents, pl. 111. 2. Roll. Abr. 187. 12. Co. 12. 2. Roll. Abr. 164. pl. 16. 11. Co. 86. 13. Hen. 8. 16. a. Hale's H. P. Cor. 1 vol. 56. Raym. 448. Case of the Town of Winchelsea, Plowd. Com. 313. 336. 12. Co. 123. 13. Childs v. Sans, in Saund. 297. Lutw. 353. 3. Lev. 160. Dyer, 60. b. The Corporation of Trinity House v. Richard Bowater. The Case of the Cor-

poration of Trinity House, 1715, by Lord Cowper. The Corporation of Trinity House v. Sir Malthus Ryals, 1725, in the House of Lords. 4. Inst. 145. Davis, 12. Lit. sect. 374. Cro. Jac. 340. 399. 521. 2. Keb. 114. Gibbs v. Hoskinson, Dyer, 60. Br. Covenant, 2. 2. Roll. Abr. 288. pl. 2. 285. pl. 82. Patents to erect lighthouses on another's soil upon record at the Rolls, 28. Hen. 8. 13. Jac. 1. Dungeness Lighthouse to Howard, 11. Car. 1. Dungeness Lights to Bullock, 32. Car. 1. Three Lights to Shipman, 23. Car. 2. Three Lights to Smith, 30. Car. 2. A Lighthouse on Sir Edward Turner's Ground to Trinity House, F. N. B. 222. A.—NOTE to MS.

(b) 3. Inst. 204.

(c) 4. Inst. 148.

and

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against
GREY.

and that could be given only by parliaments (a). In *Easter Term*, in the first year of *James the First*, it was resolved, by the two Chief Justices, the Attorney and Solicitor General, that the statute of *Elizabeth* was a general law, extending to all light-houses. In this case there ought to have issued an *ad quod damnum* (b). The present question will receive a great light from the general laws of nations, wherein the *publica utilitas* is not understood to mean anything lucrative, or to increase the public coffers or treasures, which would make property precarious; but he who loses his property for the public safety or service ought to be satisfied for it (c). *Grotius* (d) says, that losses for the public good ought to be equal. *Puffendorff* (e), who wrote about fifty years after *Grotius*, speaking of the sovereign power over estates, sums up all *Grotius*'s arguments into one chapter: and our laws agree with these general reasons. In the case of the prerogative of the crown in digging salt-petre (f) it is said, that the inheritance must be left as it was found; that what is done out of necessity ought to be repaired; and that it is but a purveyance, and is not to be granted (g). In 1. *Hale's H. P. Cor.* 56. there is a record of a case where a county ransomed themselves from the king's enemies for their common welfare, but the party who paid the fine was recompensed for it (h). This prerogative can hurt no man's inheritance. The necessity which gives the crown a prerogative in the subjects property must not be for the convenience of a particular part of the subjects, as in this case, or for profit to the crown, but to obviate general dangers, and then the owner ought to be satisfied. SECONDLY, The cases where a man by opening a road or street in his own ground, or using his chapel as a parish-church, is said thereby to have given them to the public (i), are instances wholly of a public nature; and making such a street is for the benefit of the party, being for the easement of his own tenants; but no such covenant is implied in the present case. In *Cro. Jac.* 240. it is said, that the patentee, when he takes by the patent, consents to all that is therein, which shall be taken and interpreted as a covenant on his part; yet that will not reach the present case, for here the grantee is bound no longer than during the term, and the covenants extend no farther; and therefore, upon the expiration of the term in the grant, the land continued the owner's. In these patents, wherever the soil is in the crown it is always granted, and where it is the owner's it is taken notice of. In the seventeenth year of *Charles the Second*, *Tinmouth Lighthouse* was granted to *Edward Villers*, and the crown granted the soil. In

(a) 8. *Edw.* Co. 13.

(b) 2. *Edw.* 3. 7, 8.

(c) *Grotius de Jure Belli et Pacis*, lib. 1. c. 1. sect. 6. lib. 2. cap. 14. sect. 7. lib. 3. cap. 19. sect. 7. lib. 3. cap. 20. sect. 7. *De Fide Publica qua Bellum finitur.*

(d) *Cro. de Jure*, sect. 8.

(e) In lib. 8. c. 5. f. 3. f. 7. lib. 3. *De Jure Naturali et Gentium.*

(f) 12. Co. 12.

(g) 2. *Roll. Abr.* 178. pl. 10.—See also the Case of Mines, in *Plowden's Commentaries.*

(h) 2. *Inst.* 63.

(i) 2. *Roll. Abr.* 282.

the

TRUSTEES
against
GIBBS.

the twenty-eighth year of *Charles the Second*, the patent of *Spurnepoint Lighthouse*, at the mouth of the *Humber*, was granted to *Justinian Angell*, the proprietor of the ground. And they cannot grant a toll but upon equal terms, as where a benefit arises from it to those who pay (a). The case of *Gibbs v. Osbaston*, where it is said, that an ejectment will not lie for a lighthouse built in a different place from that where the former stood, seems, from the record, to be but a *dictum* of *Mr. Keble*, and proves nothing but that there is scarcely a case in that author which can be depended upon.

BOOTLE for the defendant. This ejectment is not maintainable. There is a cession of the land to the crown, which for the public benefit is considered as an extinguishment of right. Lighthouses, *ignes monitorii*, &c. are set up by the crown only, and can be erected by no other authority; therefore the property in them must necessarily be in the crown (b). After the term comprised in the patent is expired, the crown takes the land as a reversioner; like the case where a tenant fixes coppers, &c. to the freehold, which is deemed a gift in law to the reversioner (c); for though they might be removed during the term, yet if they are continued there after the term, they become a gift in law to him in reversion, and are not removeable. So if the lessee builds a new house on the land demised, the lessor may bring an action of waste against him for letting it go out of repair (d). Upon an equal claim of right, the crown has the preference (e). This is as much a gift of the ground to the king as building a street is a gift of it to the public; and there is no difference. The *Case of Mines* (f) was so adjudged, upon the reason of it being for the public good of the realm; and ballast may be dug in another's soil, it being *pro bono publico*. A tax may be laid upon persons obliged to repair beacons before they want it (g). By the civil law, property may pass without solemn act, where the case is of a public nature. By the common law, property may pass without the ordinary ceremonies of feoffment, livery, &c. as by exchange, extinguishment, cession, or dereliction of right. An exchange of lands in the same county may be without deed (h). If an infant exchange lands, and after his full age occupy the land taken in exchange, that perfects it; for it was not void at first, because it amounted to a livery (i). An exchange in the king is good, though he is seised in his public capacity, and the subject in his natural capacity (k).

This cause was again adjourned (l), and argued as follows in *Trinity Term 1740*.

(a) Bro. Ab. "Toll."

(b) 4. Inst. 148.

(c) *Poole's Case*, 1. Salk. 368.

(d) *Lord Darcy v. Aftwith*, Hob. 234.

(e) *Woodward v. Fox*, 2. Vent. 267.

(f) *Plowd.* 323. 336.—See 12. Co. 13.

(g) *Raym.* 448. *Case of Winchelsea*.

(h) Co. Lit. 57. 1. Roll Abr. 814.

(i) 1. Roll Abr. 815. pl. 4.

(k) Co. Lit. 57.

(l) It came on originally in Hilary Term 1738, when it was adjourned to the present time.

On a special verdict in ejectment the general question was stated to be, Whether the acceptance of letters-patents to create a lighthouse gives the reversion of the soil to the crown?

TRUSTOUT
against
GARY.

PROCTOR for the plaintiff insisted, that the soil continued in the owner, because it is a maxim, that *Cujus est solum ejus est usque ad cælum*; and although no lighthouse shall be erected without the king's licence (a), it does not follow from thence that he may erect them wherever he will. The king's licence is only to do that which cannot be done without; and if that licence be but for years, there is no reason why the land should pass for ever. Fairs, markets, rivers, ferries, &c. are for the benefit of the public, and yet a grant of these to another's prejudice is void. The *Case of Mines* was cited on the other side from *Plowden*; but the reasons there given do not extend to this case: for lighthouses may as well help our enemies as the subject, but beacons are for the defence of the whole realm. So is digging salt-petre, which must also be done in that way which is least prejudicial to the subject. The king may lay embargoes (b), but they are for the defence of the realm, and the subject's property is not to be prejudiced (c). The king cannot give me power to oust another of his land (d). In *Darcy v. Aikwith* (e) it is said, that anything essential to a grant shall pass as incident; but that is not applicable to this question. When these erections ceased to be lighthouses, they ought to be considered as buildings, and the owner may use them as such, though not as lighthouses. The case of *Woodward v. Fox* (f), concerning the king's prerogative in *bonis nullius*, is not applicable to this matter; but *Gibbs v. Osbaston* (g) is with us. A dispensation-licence passes no interest, but only makes that lawful which would not be so without (h). And this licence has its effect for the time, which is the lawful operation of it. And this prerogative is not to be erected for the benefit of a part of the kingdom, but it must be for the defence of the whole nation in general.

FLOYD for the defendant. It must be granted to us, that the whole ought to be preferred to a part, and that property is sacred until the public use requires it; which is the original compact upon which property subsists: and then property is not taken away, but ceases; and yet *Cujus est solum ejus est usque ad cælum*. In 4. Inst. 151. there is a commission to erect firebores, &c. and to levy a toll for supporting the same. Fairs, markets, ferries, &c. are rather encumbrances than anything else; but lighthouses are of necessity. And as to their being liable to be made use of by our enemies, our ships, &c. may be made use of by our enemies, if taken by them; and therefore that can be no argument against them. Cession to the public, as stated in *Puffendorff de Usu Captione*, is not unknown to our laws; as in the case of letting out a street to

(a) 3. Inst. 204. 4. Inst. 148.

(b) Carth.

(c) Plowd. 236. Moor, 671.

(d) Roll. Abr. 164.

(e) Roll. Abr. 164.

(f) Hob. 234. S. C. Hutt. 19.

(g) 2. Vent. 267.

(h) 2. Keb. 115.

(i) Vaugh. 320.

THURSTON
against
GLEY.

the public, which cannot be resumed (a). So of a man's private chapel (b). So in equity, if a man see another build on his ground, and say nothing against it, he shall not be suffered to pull it down again. And this erection under the grant is either a gift or an exchange of the soil; and therefore judgment ought to be given for the plaintiff.

PAGE, *Justice*, being absent, this was ordered to stand over for judgment till next Term.

Adjourned.

(a) 6. Mod. 307. 2. Inst. 701.

(b) 2. Roll. Abr. 288.

Case 275.

The King against Wyvill and Others.

An information granted against copyholders for a riot in pulling down inclosures on a claim of common; they having neglected to try their right to common pursuant to a rule of court.

- 1. Roll. Abr. 406.
- Bridg. 10.
- 2. Inst. 83.
- Comy. 341.
- 1. Burr. 265.
- 2. Term Rep. 391.

THE DEFENDANTS were copyholders who claimed a right of common to be taken in the fields after harvest till the land is sowed again, &c. except in their own grounds. Being kept out by inclosures, they assembled together, and began to pull down the fences. Upon being forbid to proceed from pulling down any more they desisted, but soon after returned again, and in all pulled down two hundred and ninety rods of inclosure; for which they were now to shew cause why AN INFORMATION should not be granted against them for a riot.

IT WAS ARGUED for the defendants, that this case being a matter of private right ought not to be tried by a criminal proceeding, as an information (a). And it was compared to the common of Strack, in *Sir Miles Corbett's Case* (b).

IT WAS INSISTED for the king, that commoners could not, under a pretence of right, justify acts of violence and injustice; for where they are injured, the law has provided a remedy for them (c); and therefore if commoners break down hedges or pales, or throw down ditches, they are rioters (d).

LEE, *Chief Justice*. The rule was for the defendants to shew cause why AN INFORMATION should not go against them for a riot. The time when these inclosures were made does not appear. There seems to be a confession of right of common in them, viz. that the freeholders, &c. have a right of common between the reaping and sowing the fields, except in their own grounds. I cannot interpret this to be a common *pur cause de vicinage*. There is no warrant for that opinion. Where the Court sees a doubt whether the party who has done the act has a right, to prevent the trial of it there should be something shewn very strong. In this case I seem inclined to the right of the copyholders. If a man having a right of common is excluded by erections, he may have a special action

(a) *Bex v. Rhodes*. The Case of the Manor of Hampstead.

(b) 7. Co. 5.

(c) 2. Roll. Abr. 405.

(d) 3. Inst. 176.

on the case against the lord, setting forth that he could not thereby enjoy his common in so full a manner as he should. And an information for a riot in removing hedges by copyholders, &c. was denied since I sat here, there being a claim of a right, and no greater force, &c. used than was necessary to remove them. And when it appears that the party had no right, then he must answer it. Therefore I think this rule ought to be enlarged, until it appear what right the copyholders had to remove these fences, agreeable to the common practice; and this matter being tried in a civil way, you may apply again to the Court.

THE KING
against
WYVILL
AND OTHERS.

MR. SERJEANT EYRE proposed, that the rule should be enlarged by consent.

PAGE, *Justice*, who assented to this proposal, cited *Burnet v. Sir Robert Barnell*.

PROBYN, *Justice*, of the same opinion. If the inclosures were made before the tenant came in, it is more inexcusable to pull them down than if erected afterwards and newly erected. Here are two hundred and ninety rods of fences thrown down, though there were sufficient gaps for them. Where copyholders assert their right in this manner, and being forbid, as in the present case, return again, it is an illegal method of asserting a civil right, and seems to me an act of force (a). In the cases put, there was no more done than was necessary; and I agree to them. In the case of *Whaddon Chase*, all the parties were tenants, and the information was granted. And the manner of acting in this case distinguishes it from those put. But if you will try this civil right, I am for enlarging the rule; but it must be done within a certain time.

CHAPPLE, *Justice*, absent in the Duchy-court.

PAGE, *Justice*. Let them agree in trying this. I do not think their being forbid signifies anything.

The rule for the information having been enlarged upon terms, namely, that the copyholders should try their right the following assizes, was, in *Michaelmas 1739*, made absolute, they not having proceeded to trial pursuant to the rule.

(a) The distinction seems to be this: If the lord of the manor make a hedge round the common, or do any other act that entirely excludes the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common; but if the commoner can get at the common and enjoy it to a certain extent, and his right be merely

abridged by the act of the lord, in that case his remedy is by *action on the case*, or by *an assize*, and he cannot assert his right by any act of his own. *Per Lord KENYON*, *Sadgrove v. Kerby*, 6. Term Rep. 485. See also *Mason v. Cesar*, 2. Mod. Rep. 65. and *Cooper v. Marshall*, 1. Burr. 265.

The King against Harman,

Case 276.

THE QUESTION was, Whether a *certiorari* should be granted to remove orders of justices before an appeal to their sessions?

A *certiorari* lies to remove an appointment of overseers before appeal.

THE KING
ex parte
HARMAN.

LEE, *Chief Justice*. No doubt but a *certiorari* lies from this Court to remove orders of justices, notwithstanding the statute gives an appeal to the sessions, which privilege of appeal does not take away the jurisdiction of the Court in this point. The question then is, Whether this Court has made any rule to make it irregular to grant a *certiorari* before an appeal first made and determined? That rule in *Salk. 147.* relates only to cases where a certain time of appeal is fixed. But suppose this rule were general, it may be dispensed with for the benefit of the party who has the privilege of appeal, as this case is. Though thousands of orders of appointment have been removed here before any appeal, yet I do not deny but there is an appeal given by the statute; but he for whose benefit it is may waive it. After appeal, indeed, the Court will not remove orders by *certiorari* till the judgment of the sessions has been given thereon. The rule to supersede the *certiorari* must be discharged.

Case 277.

The Sheriff of Hampshire against Godfrey.

Upon a motion for an attachment against a defendant for an escape, if it be sworn that he was lawfully arrested, it shall be presumed to have been accompanied with all the circumstances which the law requires to constitute an arrest.

THE PLAINTIFF arrested the defendant *Godfrey* in the county of *Hampshire*, who desired leave to go to the next house, which happened to be in the jurisdiction of the town and county of *Southampton*. He by that means made his escape. Upon all this appearing upon affidavit,

THE SOLICITOR GENERAL moved the Court to make the rule for an attachment against the defendant absolute.

DRAPER, *Serjeant*, for the defendant, insisted, that it was not sufficient to say that the defendant was arrested, for that there can be no arrest without an actual touching (a).

MR. SOLICITOR GENERAL *contra*, that the rule ought to be made absolute; that breaking into a room charged with a legal writ against a person is an arrest, though he escape out of the window. Submission to process is an arrest (b); and a rescue may be returned upon *mesne process*, but not upon *execution*, because in the first case he cannot raise the *posse*, as he may in the other case (c).

LEE, *Chief Justice*. When officers swear that they have arrested a person; it shall be supposed that they observed all the circumstances; though a man is not touched, yet if he know there is a process against him, and submit to it, it is an arrest. The case of *Genner v. Sparkes* is good law, for there the man endeavoured to avoid the arrest, and did not submit to it. If bailiffs permit a man to go to a public-house, and he gets into another jurisdiction, it is a fraud and a rescue in those who assist him. It is a rule of this court,

(a) *Genner v. Sparkes*, 1. Salk. 79.
S. C. 6. Mod. 173.

(c) Sec 6. Mod. 141.

(b) See *Hornet v. Eatten*, Bull. N. P. 62.
Blatch v. Archer, Cowp. 64.

that

that you cannot apply for an attachment until a rescue is returned, where it may be returned, as in case of *mesne process*; otherwise where a rescue cannot be returned, as upon an execution.

THE SHERIFF
OF
HAMPSHIRE
against
GODFREY.

PAGE, *Justice*, absent, *propter ægritudinem*.

PROBYN, *Justice*. As an arrest cannot be made without laying hands, where an arrest is sworn, it must be supposed the hands were laid upon the person arrested. If no hands are laid upon a man, but his horse is stopped, and he prays to go to a house to make it up, it is a submission to the process; and if he go into another jurisdiction, it is a fraud. If a man run out of custody into another county, they may pursue and retake him.

CHAPPLE, *Justice*, of the same opinion.

LEE, *Chief Justice*. Upon a rescue, the usual practice is to grant an attachment (a).

The rule for attachment must be made absolute.

PROBYN, *Justice*, said, that officers who give security to the sheriff cannot be witnesses either for or against him, because they are parties in interest.

(a) Rex v. Belt, 2. Salk. 386.

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E A S T E R T E R M,

The Twelfth of George the Second,

I N

The Common Pleas.

Sir John Willes, *Knt. Chief Justice.*Sir Alexander Denton, *Knt.*Sir John Fortescue Aland, *Knt.*Sir William Fortescue, *Knt.*} *Justices.*Dudley Ryder, *Esq. Attorney General.*John Strange, *Esq. Solicitor General.*

Waring against Bletchington.

Case 278.

RULE nisi to amend a judgment entered on the roll in a subsequent Term to that in which judgment was entered: the amendment desired was, to insert "*do recover*" instead of "*ought to recover*," which is uncertain, and not a judgment to recover.

Judgment amended by inserting "*do recover*" instead of "*ought to recover*."

IT WAS SAID *against the amendment*, that it is an error in law and not the misprision of a clerk, and therefore ought not to be amended in a subsequent Term, the Court having no such power. Cases cited against the amendment were, *Blackmore's Case*, 8. Co. 156. *Cro. Eliz.* 497. *Palmer*, 198. 259. 1. *Roll. Abr.* 201. 1. *Brownl.* 56. 1. *Lev.* 430. 5. *Mod.* 147.

1. *Roll. Abr.* 201.
Stra. 869.
Ld. Ray. 1570.
Dougl. 116.
1. *Vent.* 132.
1. *Com. Dig.*
"Amendment"

CONTRA, *in support of the amendment*, the cases cited were 1. *Vent.* 132. *Easter Term*, 10. *Geo.* 2. *Forster v. Blackwell*, where the amendment was exactly in the same words. *Hob.* 327. *Cro. Jac.* 603. 2. *Leon.* 1, 2. *Cro. Eliz.* 203. *Stiles*, 265. 1. *Roll. Abr.* 751. 1. *Sid.* 76.

(R.).

THE COURT were all of opinion that the amendment should be made, for as the words now are it is no judgment of the Court, but a mere nullity; that the statute 16. & 17. *Car.* 2. warrants it; for though it do not fall within the instances there given, yet it is a mistake of the like nature.

Case 279.

Colthurst *against* Colthurst.

In what case pleading must conclude to the country.

DEBT ON AN ARBITRATION BOND. The defendant pleads "no award." The plaintiff replied, that the arbitrators made an award, by word of mouth, that the defendant should pay the plaintiff two hundred and sixty-four pounds, and that the plaintiff demanded that sum, and the defendant refused, &c. The defendant rejoined, that the arbitrators refused the charge of the award, and traversed the award by word of mouth. To which the plaintiff demurs.

The rejoinder is only an inducement and the same as the traverse, and would put the plaintiff to an unnecessary sur-rejoinder; that they did award by word of mouth: and *Cro. Eliz.* 754. 2. *Salk.* 583. *Co. Lit.* 126. a. *Yelv.* 137. were cited.

WILKES, Chief Justice. In all facts where a single point is put in issue, the party ought to conclude to the country. If issue be joined a traverse must necessarily be a denial, for no issue can be joined without a negative and an affirmative; and therefore the defendant should conclude to the country, and not by averment; and gave

Judgment against the defendant.

Case 280.

Marriott *against* Thompson.

Quere. Whether a widow, as administratrix of her deceased husband, can retain, on a bond given to her *duo sola* conditioned to leave her so much money on his death, if the marriage took effect.

DEBT ON A BOND against the defendant as executrix of her husband. She pleaded that her husband, before marriage, was bound in an obligation, that if the marriage took effect, and she survived him, he would leave her four hundred pounds, otherwise the bond to be in force; that he died without leaving her any such sum, and made her his executrix; and that she retained for the sum in the bond; and that she had no assets *ultra*.

IT WAS OBJECTED, that she cannot plead a retainer on a bond given to another person, because the reason of retainer is for want of a person against whom to bring the action.

Co. Lit. 164.
2. *Bl. Rep.* 965.
4. *Term Rep.* 640.

DRAPER, Serjeant, contra. The reason of retainer is because the same hand is to pay and receive, and such retainer is considered as a privilege and as a payment, as 2. *Roll. Abr.* 684. pl. 8. and *Grey v. Driscall*, *Trinity Term*, in the tenth year of *George the Second*, adjudged, that a retainer may be given in evidence on a *plene administravit*, because the law changes the property of so much of the goods; and as the manner in which the four hundred pounds is to be paid is not set forth, it must be by executors; and in *Hob.* 127. *Noy*, 26. it is laid down that an executor may retain; and the testator, by making her executrix, seems to have intended to prevent the forfeiture of the bond; and if she suffered the bond to be forfeited, it may be a *devastavit* in *1. Kent.* 354.

PAGE and DENTON, *Justices*. An executor cannot retain for the penalty of a bond, because the plaintiff may reply to the plea of the executor, that there is but so much due. And although it was objected that the penalty belongs to the obligee, and the wife has no remedy but in equity, yet it is laid down in *Dyer*, 2. *Moor*, 2. 1. *And*. 36. that an executor, who has no right of action, may yet retain; as where the executor pays money to the value of the goods; and the case of *Roskelly v. Godolphin*, in *Raym.* 482. *Show.* 403. and *Skin.* 215. is in point, except the words "to leave her" and "to pay her" make a different report. I allow retainer may be given in evidence, but it must be a debt which sub-
sisted and was due to the executor.

MARRIOTT
against
THOMPSON.

WILLES, *Chief Justice*. I took it that the method was, that the obligee should bring an action and the executrix confess judgment to him, and he should assign a judgment to her, and then she may plead retainer. Equity is against the retainer, for in chancery they allow neither *merger* nor *retainer*, but both are at law on the foot of the rule of retainer, that she may retain where she cannot have an action, as where she satisfies out of her own goods; and if she may do this in the case of a stranger, why not in her own? and more it is so to do. The next enquiry is, if she has pleaded as she ought to do; for it should be pleaded that it was in order to avoid the penalty of the bond; but she has pleaded that no part of the bond is paid, which contradicts her retainer.

Adjournatur.

Grigg's Case.

Case 281.

A. ENFEOFFS B. for a valuable consideration, of lands in *Hilton*, in the parish of *Massum*, and covenants that he and his wife shall make further assurance to the fee. The feoffee enjoys the possession for twenty-three years, and then sends to the feoffor and his wife, desiring they would acknowledge the note of a fine before commissioners of his lands in the parish of *Massum*, which the feoffor refused; on which an action was brought.

On a covenant to levy a fine, the covenantor is not obliged to acknowledge a note of a fine for other lands.

IT WAS OBJECTED, that the defendant should not refuse the note of a fine for containing more acres than he ought to pass by the fine, because the admeasurement may not agree; as *Cro. Jac.* 251. 1. *Bull.* 90. *Moor*, 810.

DRAPER *contra*. That having more land in the parish than passed by the feoffment, he is not obliged to acknowledge that note; and the feoffor and his wife are excusable, if any prejudice may arise from it: and though no more lands may pass by the fine than are contained in the feoffment, yet the wife will be barred of her dower in the rest; and cited 2. *Bull.* 317. 1. *Roll. Rep.* 103. 117.

WILLES,

Gale's Case. *WILLES, Chief Justice.* This case does not depend on the authority of the cases cited on either side. If on a covenant to levy a fine, the note of the fine with which the covenantor is served contains a few more acres, it is no excuse to refuse it; but when the note contains other lands it is quite different; and the lands in the note, in the present case, are in another place than the lands in the feoffment are. There is no covenant on the wife's part, nor is she obliged to bar herself of her dower. And the note does not speak of *Hilton*, but the parish of *Massum*.

FORTESCUE ALAND, Justice, said the fines could enture to no other use but to bar her of her dower in the other lands. And for this last reason,

In *Trinity Term* following, judgment *nisi* being given this Term; was then confirmed.

TRINITY

TRINITY TERM,

The Thirteenth of George the Second,

IN

The Common Pleas.

Sir John Willes, *Knt. Chief Justice.*

Sir Alexander Denton, *Knt.*

Sir John Fortescue Aland, *Knt.* } *Justices.*

Sir William Fortescue, *Knt.*

Dudley Ryder, *Esq. Attorney General.*

John Strange, *Esq. Solicitor General.*

Down against Rowell.

Cafe 282.

IN country causes, that is, where the defendant lives above twenty miles from *London*, the defendant has eight days to plead in from the notice, four days longer than those that live in town or nigh it. The defendant, after the four days rule to plead was out and before the eight days were expired, demanded *oyer* of the plaintiff's bond set forth in the declaration, and on the ninth day took out a summons from a Judge for that purpose, and for longer time to plead to it; the plaintiff being advised that *oyer* could not be demanded after the four days rule was expired, though the defendant had eight days to plead in, signed judgment notwithstanding this summons. And now the defendant moved the Court to have it set aside, *oyer* of the bond having never been given as demanded.

A defendant who lives above twenty miles from *London* has eight days to plead, and may demand *oyer* at any time before they expire.

3. Mod. 228.

1. Mod. 1.

4. Bac. Abr. 27.

6. Mod. 175.

Tidd's Pract.

243.

The question was, Whether a defendant, who lives above twenty miles from *London*, and by a rule of the Judges has eight days to plead in from notice first given, has time to demand *oyer* of a bond, &c. any time before his pleading is out? or, Whether he ought to have demanded it before the first four days of pleading?

N. B. The rules to plead are never given for eight days, but all for four days, though the defendant has eight days to plead in.

And

Down
against
ROWELL.

And as to the first question, WILLES, *Chief Justice*, and DEN-
TON, *Justice*, were of opinion, that the defendant should have the
same time to demand *oyer* in as he has time to plead in, without
having any regard to the four days rule for pleading, which the
Chief Justice said ought to be made eight days in case the defend-
ant lived twenty miles from London.

FORTESCUE ALAND, *Justice*, on the contrary, thought that
the defendant must demand *oyer* within the four days, though he
has eight to plead in; because, said he, if the defendant can de-
mand *oyer* in eight days, he may demand the same time to plead in
abatement, and the constant rule has been, that the defendant cannot
plead in abatement after four days.

WILLIAM FORTESCUE, *Justice*, gave no opinion, but sub-
mitted to his Brothers.

Summons, after
time to plead
has expired, is
a nullity.

And another question was, Whether this summons taken out by
the defendant the ninth day, after his time for pleading was ex-
pired, though before the plaintiff had signed his judgment, could
have any right in setting aside the judgment, or was not taken out
too late?

As to the last question it was agreed, that if a summons for time
to plead be taken out, after rules to plead are out, the summons
will avail nothing, and the plaintiff may sign his judgment not-
withstanding.

The judgment was set aside.

Case 283.

Preston against Funnell.

A devise "to A
" for life, with
" remainder to
" the nearest re-
" lation, viz. to
" B. my bro-
" ther's son, and
" his heirs; re-
" mainder to
" my nearest of
" kin, first male
" then female,"
directing that the
estate should ne-
ver be sold, but
kept in repair,
and descend to
the family, con-
veys an estate in
fe to B.

AT A TRIAL of *nisi prius* the following case was made for the
opinion of the Court:

T. Eagle seized in fee of copyhold lands surrendered them to the
use of his will, and died. He devised them by his will in the fol-
lowing manner: "I give to my brother T. Eagle all my goods;
chattels, &c. houses, lands and tenements, and whatever else I
have in the world, for and during his natural life, my debts and
legacies being first paid; and then the houses and lands to the
nearest of my relations, that is to say, to Thomas Eagle, my
brother's son, to him and his heirs; and after their decease to
the nearest of kindred to me, first male and then female; which
said lands and houses are never to be sold, but to be kept in re-
pair; and that this house which I now live in is to descend to
the names of the Eagles, and to be kept up as long as the world
endures, and never to be sold." That the testator died seized;
after whose death Thomas Eagle, the brother, entered and died;
and after, at a court of the manor, Thomas Eagle, the nephew,
was admitted, and surrendered the premises for a valuable con-
sideration to one J. Charles and his heirs, who demised them to
the

the defendant. The case further states, that there is a custom in the manor for the tenants to suffer a recovery of those lands, of which a recovery ought by law to be suffered; and that *T. Eagle*, the nephew; before his death, never suffered any recovery of these premises in the manor court. The lessor of the plaintiff is the nearest of kin to the testator, and heir at law to him.

PRESTON
against
FUNNELL.

THE QUESTION therefore upon this case was, Whether *T. Eagle*, the nephew, took an estate in fee or in tail by this devise? If he took an estate in fee, then there was no need for a recovery, and consequently the verdict will be for the defendant; if he took only an estate in tail, then he could not dispose of it without a recovery, and having never suffered any, it will be for the plaintiff, as heir at law to the testator.

THE COURT were all of opinion that *T. Eagle*, the nephew, took an estate in fee; for it is plain that the testator meant and intended, by the words of his devise, to create a perpetuity, which the law abhors, and ought to be avoided. And we must construe the word "heirs" to mean "heirs general" of the nephew, and not "heirs of his body." The rule of law upon construction of this word "heirs," when there has been a limitation over, is, that where the first devisee cannot want heirs as long as any of those are in being to whom the estate is devised over, there the first devisee shall only take an estate tail, though the devise be "to him and his heirs," for "heirs shall be construed only to mean "heirs of his body;" but if the estate be limited over to a stranger, or to one or more who may not be heirs to the devisee, there the word "heirs," though there be a devise over, shall pass a fee to the first devisee, and the devise over be void. Now here the nearest of kin to the testator might be of the half-blood to *Thomas*, the nephew, who was the first devisee, and consequently not capable of inheriting to him; and the contrary does not appear upon the case. If we were to put any other construction upon it, we must also construe it "heirs male, &c." for it was plainly the intention of the testator that it should always continue in the name and family of the *Eagles*; and if it was to be limited to daughters, that would defeat the testator's intention. The testator likewise might want heirs; for as it is limited to the nearest of kin, that nearest of kin might be of the half blood, which could not be inheritable to the testator.—Therefore WE ARE OF OPINION for the defendant, that *T. Eagle* had an estate in fee in him, and consequently could dispose of it without suffering any recovery.

Tapner against Murrett and Prior.

Case 284.

UPON AN EJECTMENT the following case was made at the assizes for the opinion of the Court.

Sir Thomas Milner seised in fee of lands did, by lease and release, in consideration of the marriage of his daughter, convey them

An estate for
years cannot be
coupled with an
estate in fee.

TAPNER
against
MURLETT
AND PRIOR.

as follows: "to trustees for the use of himself till the marriage took effect; remainder to Sir J. Farrington, who was to marry his daughter, for ninety-nine years, if he so long lived; remainder to trustees to preserve contingent remainders; remainder to his daughter for her life; remainder to the sons in tail general, to daughters in tail general; and for want of such issue to the use of J. Farrington, his heirs and assigns for ever."

J. Farrington died without issue, and before his death made a will, by which he devised the premises in question to John Murlett. J. Murlett died, and devised them to Joseph Murlett, the defendant in tail. Elizabeth, the wife of J. Farrington, died afterwards without issue. Joseph Murlett levied a fine in Trinity Term, which was recorded in Hilary Term following, from which time the proclamations were begun to be made, and continued to the Trinity Term following, in which Term the plaintiff brought an ejectment, three proclamations only being then past, but the fourth was afterwards made. The plaintiff made no other proof of an entry at the trial but by this ejectment. The plaintiff is the heir at law of J. Farrington, the devisor; and J. Murlett, the defendant, claims under J. Farrington's will, and Prior under Murlett.

THE QUESTIONS WERE;

FIRST, What estate J. Farrington, the devisor, had in him at the time of his devise to Murlett?

SECONDLY, What was the operation of this fine levied by Joseph Murlett?

THIRDLY, Whether this entry by ejectment is sufficient to avoid the fine?

THE COURT said, they should give no opinion as to the first two points; only that J. Farrington at his death had an estate for years with a fee expectant, and that an estate for years was not such an estate to which a fee can be coupled; but his heirs must take as purchasers and not by descent.

BUT THE CHIEF JUSTICE said, he doubted whether the word "assigns," though it did not alter the estate, would not give J. Farrington a power to dispose of it, and then the person nominated by the will of J. Farrington to take, may be understood to be his assigns; but said he did not give this as his opinion, only as a doubt that arose with himself.

There must be
an actual entry
to avoid a fine.

AS TO THE LAST QUESTION, they were all of opinion clearly for the defendant, that where one gets into possession and levies a fine, either at common law or on the statute, the person who is out of possession must make an actual entry; and that the bringing

ing an ejectment is not a sufficient entry in this case to bar the fine (a).

**TAYNER
against
MURLETT
AND PRIOR.**

IT WAS HELD that a fine was said to be engrossed when it was brought to the chirographers and engrossed by them, and that it could not be proclaimed till it had been so engrossed. That it is a good fine from the time of levying, that is, from its being entered in the king's silver office, to all intents, except barring, on the statute of Non Claim, 24. Hen. 7. c. 24. from which the fine must be computed from the last proclamation made, viz. five years after the Term it was last proclaimed in.

Fine for the purpose of barring strangers, must be computed from the last proclamation, i. e. the Term in which it was last proclaimed.

(a) See *actg.* Berrington v. Parkhurst, 2. Stra. 1085. 4. Brown. P. C. 353. Fitchet v. Adams, 2. Stra. 1128. Oats v. Brydgar, 3. Burr. 1897. Goodright v. Caton, Dougl. 486. But this

only applicable to a fine with proclamations; for an actual entry is not necessary to avoid a fine at common law, Jenkins v. Pritchard, 2. Will. 45. Musgrave v. Shelly, 1. Will. 214.

Creeke, Executor, &c. against Pitcharn.

Case 285.

THE DEFENDANT libelled in the spiritual court against the plaintiff, for tithes due to the defendant from the plaintiff's testator, and sued him as executor, &c.; the plaintiff suggested a *modus*, and therefore obtained a prohibition at common law. At the trial the plaintiff in the prohibition made no evidence of the *modus*, and was nonsuited.

An executor nonsuited on prohibition is not liable to costs.

S. C. 1. Barnes, 103.
S. C. 2. Barnes, 100.
S. C. Co. G. 157.
S. C. Pract. Reg. 118.

The defendant moved this Court, that the plaintiff, notwithstanding his being executor, might pay the costs of the prohibition.

See Hullock on Costs, 313. 315. 321. where all the cases on this subject are collected.

But THE COURT denied it and said, as he was sued as executor he might well bring the prohibition as such, and could not obtain it any other way, and therefore ought not to pay costs. Indeed if one sue as executor, &c. when he might have sued in his own right, we shall have no regard to it, but make him pay costs if any is due; but the plaintiff has sued as he ought. All the Judges have agreed that costs shall be taxed, upon a prohibition, from the time of the motion for the prohibition first made.

Anonymous.

Case 286.

IN ARREST OF JUDGMENT it was moved, FIRST, Because the cause was tried as an action of trespass, and the writ was purchased as an action of trespass on the case.

Amendment, and the attorney ordered to pay the costs.

SECONDLY, The writ was purchased against *James Stiles*, and the declaration was against *John*.

THIRDLY, It was not laid in the declaration that the defendant took the plaintiff's goods, though it was in the writ.

FOURTHLY,

ANONYMOUS.

FOURTHLY, The *distringas* issued out to the coroner to return the jury, which is said in the *juratur* to be returned by the sheriff.

THE COURT. If the Judge has a right to try the cause, the errors and mistakes of the clerk will not set aside the verdict. All records are considered as the acts of the Court, and made up by it, and consequently the Court might and should amend them for their own honour and credit. Original writs were not amended, because they issue out of another court; nor is there anything to amend them by, but here the *distringas* is a good copy by which to amend the *juratur*; in reality this declaration is very good, but if it had not it might be amended after verdict.

WILLES, Chief Justice, thought this so great a neglect in the attorney, that he ordered he should pay the expence of the motion.

Case 287.

Bosworth against Whiteman.

TO debt on a BY A BY-LAW of the city of London every citizen worth ten thousand pounds, if elected, must execute the office of sheriff or forfeit five hundred pounds, for which sum the defendant, having refused to execute the office after having been elected to it, was taken; and the cause being removed into the common pleas by *habeas corpus cum causa*, the sheriff returned the cause aforesaid: the defendant moved for leave to file a suggestion on this return, that he was a *dissenter*, and disabled by the statute, not having received the sacrament according to the usage of the church of England within a year before.

To debt on a by-law brought by the chamberlain of London, in the mayor's court of the city, against a person for refusing the office of sheriff, the court of king's bench, on the record being removed, will not permit a suggestion to be entered thereon, that the defendant is a *dissenter*, and disabled by the statute from serving the office, he not having received the sacrament, &c.

PRIME and DRAPER, Serjeants, strongly insisted,

FIRST, That the motion ought to be granted, because else the Court cannot know the truth of the cause; nor,

SECONDLY, Whether the by-law is good or no, and consequently whether they shall keep or remand the cause; and urged many authorities to justify their admitting this suggestion on returns of *habeas corpus*, as Syd. 287. 2. Keb. 30. 34. Co. Ent. 344. *Pye's Case*. So prohibitions are granted on suggestions contrary to the return on the face of the libel. 2. Inst. 608. 2. Roll. 295. *Brown*, 36. 182. 271. That a suggestion has been admitted to prove an inferior court has not jurisdiction. 2. Lutw. 1023. *Lev. Ent.* 133.

THEY FURTHER ARGUED, that the writ being directed to the sheriff, mayor and aldermen, and returned by the sheriff only, that in this return they deceived the Court, and a prohibition has been granted to a court-leet for so doing. 2. *Rall. Abr.* 217.

LASTLY, The persons who are to judge of this matter are to have the advantage of the fine. 2. *Vent.* 247. was cited to shew that *dissenters* were excused from the office of sheriff,

THE

THE COURT unanimously agreed not to grant the motion.
And

BOSWORTH
against
WHITEMAN.

WILLES, *Chief Justice*, considered. FIRST, Whether any suggestion should be filed; SECONDLY, Whether this was a proper suggestion: He held that the Court was bound down to judge on the return of the writ; and by this neither party can suffer; because if the writ was returned by an improper person, it was to be quashed, and be as no return; and if the return was false, the party injured may have an action on the case: on the contrary, should they admit the suggestion, the party injured, if it be false, is without remedy, for it is not traversable, which both distinguishes it from suggestions granted to found prohibitions on, and also from *audita querela*; for in prohibitions the party is obliged to suggest, and in *audita querela* it is traversable (a). Suggestions were never granted but where the party has no other remedy, as in claiming *consuance* (b). All the precedents mentioned in support of the motion are of this nature, for they were all granted where the conviction and imprisonment was put on to the suit, and the party had no other remedy (c). This is also the case when the defendant is obliged to file a suggestion to bring himself within the statute 4. Jac. 1. c. 3. for that is to recover costs after plea pleaded, very often after verdict. In this case, the substance of the suggestion may be either pleaded, or given in evidence, on the general issue in either court. If it be doubted whether the by-law be good or not, the method to determine it is to proceed to judgment in the inferior court, and then bring a writ of error. Allowing this to be of the same nature with a prohibition, yet a prohibition is never granted until the suit is commenced and plea pleaded, because in moving for the prohibition, it must be said that the ecclesiastical court refused the plea. But if a suggestion might be filed, this is the most improper one in the world; because, FIRST, It is directly contrary to the return; SECONDLY, If on this suggestion the Court should think proper to retain the cause, they must suppose the inferior court will act illegally, which they will never do when they of the inferior court have jurisdiction; for which reason the motion must be discharged.

(a) Plowd. 76. Cro. Jac. 76.

(c) Trem. Ent. 351.

(b) Trem. Ent. 177.

Selmon *against* Courtenay.

Case 288.

ACTION OF TRESPASS against the defendant for breaking the plaintiff's close. The defendant pleaded "not guilty," and produced ancient witnesses to prove this to be an highway, and so no trespass; and had a verdict.

The plaintiff now moved to set aside this verdict, being given upon illegal evidence, for that the defendant should have pleaded it specially, but instead of that he pleads "not guilty" and gives the highway in evidence, which cannot be done.

VOL. VII.

X

The

To trespass, the defendant cannot give "highway" in evidence on the general issue.

S. C. 2. Barnes, 350.

SERMON
against
COURTENAY.

The question was, Whether on "not guilty," this excuse of an highway can be given in evidence?

WILLES, *Chief Justice*, consulted with ALL THE JUDGES upon this question, because some of them had differed in their opinion, Whether it could be given in evidence or not? And he reported that the majority of them were of opinion, that it could not be given in evidence on "not guilty;" and that wherever a defendant confesses the allegation of the plaintiff to be true, but has something to offer as an excuse, he must always plead it specially, or otherwise cannot give it in evidence.

Cafe 289.

Gurnett against Wood.

A devise to *A.* for life, remainder to *B.* in fee, he paying to *C.* forty pounds when he shall attain the age of twenty-one, and if *B.* die under the age of twenty-one, then to *D.* and his heirs for ever, he paying sixty pounds to *C.* is an *executory devise*, and vests in *D.* immediately; and therefore if he die in the life-time of *B.* and *B.* die under age, the heirs of *D.* shall take the estate.

2. Co. 154.

4. Co. 66.

10. Co. 51.

Poph. 5.

Dyer, 244.

2. Roll. Abr.

795.

Jones, 417.

3. Corn. Dig.

"Devise"

(N. 15.).

UPON AN EJECTMENT the following case was made at the assizes for the opinion of the Court:

Thomas Gurnett, seized in fee, devised all his lands to *Dorothy* his wife, during her natural life, and after her decease to *John*, his eldest son, in fee, paying to the testator's two daughters the sum of forty pounds each when they should attain the age of twenty-one years; and if his son *John* died under the age of twenty-one years, then he devised the premises to *William Harrison*, his wife's son, and his heirs for ever, paying a further sum of twenty pounds a-piece to his two sisters upon their attaining the age of twenty-one. The testator died, the wife entered, and enjoyed the premises for her life; *William Harrison* died; and after that *John*, the first devisee, died under the age of twenty-one years.

The question was, Whether (*William Harrison* dying in the life-time of *John*, the first devisee) the remainder was so vested in *William Harrison* (*John* afterwards dying an infant) as to entitle his heir to take after *John*'s death by way of *executory devise*; or, Whether the heir of *John* shall take?

THE COURT were clearly of opinion that this was an interest vested in *William Harrison* in his life-time, and transmittable to his heir, and not a possibility only; and said, that *executory devises* must now have the same rule as *contingent remainders*, and vest immediately, so as to descend to the heirs when the contingency happens.

BUT THE COURT took some time to consider of it; and afterwards WILLES, *Chief Justice*, delivered the opinion of the Court.

WILLES, *Chief Justice*. The case is no more than this: *A.* devise to *A.* and his heirs upon a contingency; *A.* survives the devisor, but dies before the contingency happens. Afterwards the contingency happens. The question is, Whether the heirs of *A.* shall take? No doubt the devise to *Harrison* was an *executory devise*; for being after an estate given to another and his heirs in fee, it cannot be good by way of contingent remainder. For the plaintiff was cited *Brett v. Rigden*, Plowd. 345; but that case differs from this, for it was "to *A.* and his heirs,"

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against
WOOD.

"heirs," an immediate devise, and he dying before the testator, it was adjudged he could take nothing; and rightly, for a will does not operate until the death of the testator; so that nothing ever vested in *A.* and consequently not in his heirs, for they were not intended to take by way of purchase, and by descent they could not, for that can never be where nothing vested in the ancestor. But in this case *Harrison* survived not only the devisor but likewise the widow, who enjoyed under the first devisee. Then it is objected, that this is only a bare possibility, which it is said can neither descend, nor be assigned, devised, or barred by a common recovery; and to prove this were cited, *Fulwood's Case* (a), and the case of *Pell v. Brown* (b), where the last point is determined, that a common recovery will not bar it; and there are several other Books where the same things were formerly laid down. But it is to be considered, that most of those resolutions were before executory devises were in fashion, or at least before they were thoroughly established, and I believe would not be law now. I do not say anything as to a possibility being barred by a recovery; but there are several cases where a bare possibility has been held grantable or deviseable, as well as a more certain interest, as in the case of *Goring v. Bickerstaff* (c), and *Vaizy v. Tinsell* (d). But admitting it to be otherwise, the objection will not hold in the case of an executory devise, for they are not to be compared to bare possibilities, but are to be considered as certain estates or interests, or as contingent remainders: indeed since executory devises have been established, several rules have been laid down in order to prevent perpetuities: as first, that the contingency should take place within the compass of a life or lives in being, or a reasonable number of years: then the Courts went a little farther, and extended it to the case of an infant *en ventre sa mere*, because that contingency must take place in something less than nine months, and so there is no danger of a perpetuity. And in chancery they have held it good, though not to happen till twenty-one years after a life or lives in being; but in all other respects executory devises have always been resembled to contingent remainders; which appears in considering the reason on which they were founded, which is this: when it appeared the testator intended to give a contingent remainder, but had expressed himself so as it could not take effect as such by the rules of law, the courts of justice in favour of wills, and to help an apparent intention, made it good as an executory devise, as far as the rules of law concerning perpetuities would admit. Considering then this devise in the same light as a contingent remainder, it was never doubted but that it vested, though not in possession, yet as a contingent interest immediately upon its creation, and consequently transmissible. Not to mention other cases, there is a late one very solemnly de-

(a) 4 Co. 66. March, 136.

(b) Cro. Jac. 590.

(c) Pollexf. 32.

(d) Pollexf. 44. That a possibility clothed with an interest is not only de-

scendible but deviseable, see *Selwyn v. Selwyn*, 2. Burr. Rep. 1131. *Jones v. Perry*, 3. Term Rep. 88. But see on this subject *Fontblanque's Eq.* 201.

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terminated, which has put this matter out of all doubt, viz. *King v. Whitbus*: A devise to B. his daughter of two thousand pounds, payable at the age of twenty-one or day of marriage, and if C. his son died without issue male living, then his daughter to have three thousand pounds at the age of twenty-one or day of marriage; so that part of her fortune was certain, the rest depended upon contingency. The daughter lived to be twenty-one years of age and married, but died before her brother C. so that at the time of her death her interest in the three thousand pounds was but contingent; afterwards her brother died without issue male, upon which *Dr. King*, as her husband, brought his bill for the additional fortune of three thousand pounds. It was strongly insisted, on the other hand, that her interest being only contingent, and she dying before it could be known whether the contingency would happen or not, it could not be transmissible: but LORD TALBOT held it was no possibility, but an interest vested and transmissible to him as husband, and he as husband was entitled so soon as the contingency happened. This was a fortune charged upon land, and so to be governed by the same rules as land. This decree, after a long hearing, was affirmed in the house of lords; and in this case many others were cited, where contingent interests, both real and personal, were held transmissible to the heir or representative. A case was cited of *Marks v. Marks (a)*, reported in *Chancery Presidents*, which I think the best book of chancery reports extant, as applicable to this case; and as this was determined solemnly by so great a man as LORD PARKER, together with THE MASTER OF THE ROLLS, I have no doubt but it is good law. But besides that determined upon the old law, that where a feoffment is upon condition, and the ancestor dies before the performance, his heir may perform it; the Court likewise considered it upon the foot of a mortgage and redemption. But without the aid of that authority WE ARE OF OPINION, that the defendant, as heir of *Harrison*, is well entitled, notwithstanding he died before the contingency happened of *J. Gurnett's* dying under the age of twenty one.

Judgment for the defendant.

(a) Prec. in Chan. 406.—See also *Goodright v. Searle*, 2. Will. 27. Fearn's Ex. Dev. 448.

Case 290. Lushington, on the Demise of Godfrey, against Dose.

A defendant in ejectment, who brings a writ of error, must give bail to pay the plaintiff his costs, but need not enter into a recognizance himself.

S. C. v. Barnes,

77. 3. Burr. 1823. 2501. 12. Mod. 138. Rann. Eject. 421.

THE PLAINTIFF had judgment in ejectment, and the defendants, three tenants in possession and one owner of the inheritance, bring a writ of error, and become bound with two sureties in a recognizance to the plaintiff, to pay him his costs and damages if judgment be affirmed; but do not give their own recognizances, as the statute 16. & 17. Car. 2. c. 8. directs in the case of dower and ejectment.

Upon which it was moved, that the plaintiff below might be at liberty to take out execution on his judgment, for that the writ of

error,

error, without such recognizance entered into according to that statute, was no *superfedeas*.

WRIGHT, *Serjeant*, shewed cause *against the motion*, and cited the case of *Barns v. Bulmer (a)*, that the plaintiff in error need not give his own recognizance, but that bail is sufficient. And also cited 3. *Lev.* 275. 3. *Mod.* 281. S. C. to shew that where the judgment will not make him liable, there neither will his recognizance: as if the defendant in error should die before the writ of enquiry executed, this would be a discharge as to the costs and damages notwithstanding the recognizance; and that it would be very inconvenient if plaintiffs in error in ejectment, who for the most part are tenants in the country, should be obliged to come up from remote parts of the kingdom, as they must do, in order to give their recognizances in court.

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ON THE
DEMISE OF
GODFREY,
against
Dore.

DRAPER, *Serjeant*, in support of the motion, urged the statute itself, which says expressly that no judgment after verdict shall be stayed in any writ of dower or ejectment unless the plaintiff in error be bound, and says nothing about bail in this case, for that is mentioned in a different clause relating to personal actions only.

WILLES, *Chief Justice*. The statute 3. *Jac.* 1. c. 8. first obliged the plaintiff in error to give bail; but that being only in actions of debt, is extended by the act of 16 & 17. *Car.* 2. now in question, to all personal actions whatever. Dower and ejectment are mixed actions, therefore they are put in a distinct and separate clause, and have no relation to what the former part of the statute directs concerning bail; so that, considering the bare words of the statute, the plaintiff in error's own recognizance is necessary, and giving bail is not sufficient. But I believe it was not foreseen by the Legislature, that upon all recognizances on writs of error the party must come up to town and be bound, though the ejectment be of never such a trivial value, for our commission under the statute 4. & 5. *Will. & Mary*, c. 4. for taking bail in the country, does not extend to writs of error; and this would be very inconvenient where the person lives a great distance off. The other reason seems likewise material, that bail is a better security, at least in most cases, than the plaintiff's own recognizance, if not in this particular instance; so that the intent of the statute being satisfied, though not the express words, I think we ought to adhere to the practice in this case, which is, that the plaintiff in error is only to give bail. And THE COURT being all of this opinion,

The motion was denied.

(a) Carth. 121.

Nelson *against* Bael.

Case 291.

UPON AN ACTION upon an arbitration bond an exception was taken to the award itself, *to wit*, It is said in the award "that the defendant shall pay the expences, charges, and fees of the attorney."

An award that one of the parties shall pay the attorney's bill, is good.

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The

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The defendant insisted that this was uncertain, these words not being referred to any certainty, as taxation by the prothonotary, &c. and by this award he is to pay the attorney's expences and fees, be they ever so large or extravagant; and that therefore this is void for incertainty.

WILLES, Chief Justice. Though part of an award be void, yet the other part may be very good, unless it has a necessary dependance upon that which is void; for if so all of it will be void, otherwise not. As to the incertainty complained of in this award, I think it is none, and that the direction of the arbitrators, that *Nelson* shall pay the expences and costs, &c. of the attorney, is good, because it may be ascertained by law by a proper officer; and that the word "costs" can mean only the costs of the suit, which may be reduced to a certainty by a taxation. If the thing to be paid cannot be ascertained without another suit being brought, it will be void and bad; because, instead of ending suits and controversies, it will increase and multiply them. But the breach assigned here is, that *Nelson* did not pay one shilling which he was awarded to pay to the defendant, which is a distinct part of the award, and may be good, though the other part of paying the expences and costs, &c. of the attorney should be uncertain and bad. But I think it is not, for one part of the award being void will not make the other so too unless dependant on it.

Judgment was given for the defendant that it is a good award (a).

(a) See *Winter v. Garlic*, 1. Salk. 75. Comy. Rep. 330. *Wall v. Falwood*, 6. Mod. 195. *Nutt v. Long*, B. R. H. Comy. Rep. 331. *Phillips v. Knightly*, 122. Stra. 1025. *Dudley v. Nettleford*, Stra. 737. *Tomlinson v. Aniskin*,

TRINITY TERM,

The Thirteenth of George the Second,

I N

The King's Bench.

Sir William Lee, Knt. Chief Justice.

Sir Francis Page, Knt.

Sir Edmund Probyn, Knt.

Sir William Chapple, Knt.

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

Sir John Strange, Knt. Solicitor General.

The King *against* Howard.

Case 293.

ON THE RULE for shewing cause why an information should not go against the defendant for setting his father's name to an order for the removal of a pauper to his last settlement, it appeared, that in the county of *Radnor* there are but few justices, and that there is a custom among them to make use of a brother justice's name, by their general consent, in any case where the concurrence of two justices is necessary; that the defendant *Howard* is a justice of peace for this county, as is likewise his father; and a pauper being brought before him and examined, in order to be removed to his last settlement, the defendant after examination signed his own, and also put his father's name to this order of removal, who was in the county of *Middlesex* at that time.

An information granted against a justice of the peace for adding another justice's name to an order of removal.

The statute 43. *Eliz. c. 2.* directs, that the pauper shall be examined before two justices of the peace, and upon such examination be removed by them if they see fit; therefore as this pauper was removed but upon examination before one justice only, and by him

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removed,

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removed, it was a piece of injustice done the parish (a). Upon which they moved for an information against the defendant.

LEE, *Chief Justice*. This is a matter which concerns the public liberty, for the act requires that all orders for the removal of a pauper shall be signed by two justices, and that no pauper shall be removed but by such an order and examination; therefore I cannot think how this practice came into this county; this has always received the censure of this Court. The examination was not before the gentleman whose name is so set to it, and is therefore a manifest injustice to the parish where he is removed. The practice of the justices of this county is one great reason with me for granting this information (b) against the defendant, in order to prevent the like practice prevailing there for the future. Therefore I think an information ought to be granted against him.

THE REST OF THE COURT being of the same opinion, an information was granted.

(a) See *Rex v. Forrest*, 3. Term Rep. 38. *Rex v. West*, 6. Mod. 120. *Billings v. Prince*, 2. Bl. Rep. 1017.

(b) The defendant's father was at this time high sheriff for this county, and the original motion was for an informa-

tion against him for acting as a justice of peace in the same year in which he was sheriff, contrary to the statute, so that he was obliged to discover that he did not sign his name to the order of removal, in order to acquit himself.

Case 293.

The King against Dr. Whaley.

If a *mandamus* be granted to the master of a college to admit a fellow, the Court will not supersede the writ on an affidavit by the master that there is a visitor, but he must return that fact to the writ.

S. C. 1. Stra. 1139.
1. Stra. 565.

A *MANDAMUS* was moved for by one who had been chosen a fellow of a college in Oxford, but was refused to be admitted such by the defendant, who was master. The *mandamus* was granted immediately on an affidavit of the facts, without giving a rule to shew cause, directing the defendant to admit the plaintiff fellow, or to shew good cause to the contrary.

The defendant now moved that this *mandamus* may be superseded, and the master of the college not obliged to make a return to it, on an affidavit made by the defendant himself that the *Bishops of Ely* and their successors have been always visitors of this college, it being founded by one who was *Bishop of Ely*; and that the present *Bishop of Ely* is visitor thereof, and therefore that a *mandamus* ought not to have gone.

The question was, Whether, as a *mandamus* had been granted in the usual course of the Court, it shall be now superseded, there appearing to be A VISITOR to this college? or, Whether the defendant shall be obliged to make a return to it, by which the whole matter will properly come before the Court?

LEE, *Chief Justice*. This application is by one who was chosen a fellow of this college but refused to be admitted, and there is no doubt but this is the proper and only remedy for one who enjoys not that right which he lawfully ought to do. If there is a

visitor

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visitor to this college who is to visit it generally, that will be a sufficient answer to the *mandamus* that has been granted; for as it is the duty of this Court to give a remedy to him who wants it, so it is also their duty to support a jurisdiction that has a legal foundation and is properly exercised. A *mandamus* has here issued, and the matter now comes on in the same manner as if it had been on a rule granted originally to shew cause. Now I do not see how the party injured can have a remedy, if there is not a return made to the *mandamus*. Here is a man complaining properly of an injury done him, but is told that there is a visitor, to whom he must appeal; he is not satisfied that the visitor has any right, how then must it be determined? If a return be made, he may bring an action upon the return, if he think it a false one, and try it legally; but if the Court should not give him that opportunity by superseding this *mandamus*, he is without a remedy, and must be concluded by this single affidavit of Dr. Whaley's, which says that there is a visitor; therefore I can see no reason why a return should not be made to this *mandamus*, and am of opinion that it ought not to be superseded.

PAGE, *Justice*. It is a lay foundation, and every member has a freehold in it. Where the visitor acts as he should, he will be encouraged; but if he does anything against the statutes of the college, he is no longer visitor, but this Court will enquire of it.

PROBYN, *Justice*. That this *mandamus* was granted without a rule first to shew cause, will be no reason for superseding it, because it is usually so done, and was so in the case of *The King v. Usher*. The principal objection seems to be, that there is a visitor to this college; but this is not a proper way to try that question, but on the return to this *mandamus*, and there it will be on record; and if a visitor appear, this Court will not take any cognizance of it. If the Court should determine this question now, as to the visitor, and falsely, the other party has no remedy; for no writ of error lies in this case to any other court. And therefore I am of the same opinion, that a return ought to be made.

CHAPPLE, *Justice*, was of the same opinion *in tot.* and cited a case, 13. *Lev.* 65. where a *mandamus* was granted though there appeared to be a visitor.

The defendant's motion was denied (a).

(a) That the Court will supersede a *mandamus* to admit a fellow, on a return that there is a visitor to the college, see Show. 74. 3. Mod. 265. 1. Sid. 71. 1. Mod. 82. 2. Lev. 15; and under what circumstances the courts of common law will interfere where there is

a visitor, see Philips v. Bury, Skin. 447. Rex v. Bishop of Chester, 1. Will. 206. Rex v. Grondon, Cowp. 322. Rex v. Bishop of Ely, 2. Term Rep. 290. Rex v. Bishop of Ely, 5. Term Rep. 475.

Case 294.

The King *against* Greenwood.

The Court will not bail a person committed for highway robbery, if the prosecutor is positive of the identity of person.
S. C. 2. Stra.
1138.

THE DEFENDANT was indicted and sent to *Newgate* for robbing the prosecutor on the highway, and now moves the court of king's bench to admit him to bail on several affidavits of persons who saw and conversed with him in *London*, at or about the time the prosecutor swore he was robbed; and also produces affidavits that he is a man of good character, and kept a riding-school, and had above one hundred pounds *per annum* real and personal estate, besides his profession, which brought him in above two hundred pounds *per annum* more.

The prosecutor being in court was asked, whether he was certain that *Mr. Greenwood* was the person who robbed him? He said he was very certain that he was the person, and had seen him before that time in the *Tennis Court*.

LEE, *Chief Justice*. This Court has a power to bail in all cases, even in high treason; but it is a great trust reposed in the Court, and such as they ought to exercise with the greatest caution. It is true that prisons are intended for the security, and not for the punishment of the offender; but I do not know any case where this Court bails one charged of a capital crime, unless there be the greatest reason to believe his innocency. Here the prosecutor seems very positive to the man, and what the defendant has now offered by his affidavits may and will be a very proper defence for him at his trial; but upon the whole, as the prosecutor is so very positive, I think we cannot bail the defendant in this case.

The rest *ad idem*.

The defendant was remanded to *Newgate*.

Case 295.

The King *against* Pocock.

The Court will not grant an information for saying of a justice of the peace, "He is a rogue, and a forsworn rogue."
S. C. 2. Stra.
1157.

ONE *Bartholomew* having a colt stolen, went along with *Pocock* the defendant to *Mr. Kent*, a justice of peace in *Berkshire*, in order to have a warrant against the felon; and though he made oath to the theft, the justice refused to grant his warrant. In conversation at a public-house after this, *Pocock* asked *Bartholomew* whether *Mr. Kent* was a sworn justice? *Bartholomew* answered, "Yes, or certainly he would not act as such;" to which *Pocock* replied, "Why then *he is a rogue, and a forsworn rogue*."

Upon which words an information was moved for against *Pocock*.

MR. SOLICITOR GENERAL, to make the rule absolute, cited the case of *The King v. Derby (a)*, where an indictment was held to lie against a person for saying of a justice of peace, "he is a buffe-

(a) Carth. 14. Comb. 65. 3. Mod. 139.

"headed

"headed fellow, understands not law; and has not done justice to my client;" because such words do not respect the person of the justice of peace, but relate to him as he is a public magistrate and subordinate to the government; and therefore such defamatory words are a reproach to the supreme governor, to whom magistrates are intrusted, and from whom they derive their authority; and it cannot be denied that words reflecting on the government are punishable at the suit of the king, by an information.

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against
POCOCK.

LEE, *Chief Justice*. There is great difficulty with me, whether this information can be granted in point of law. The case of *Rex v. Darby* was a case of the same nature with the present, and it was there held that an information should go; but in the case of *The Queen v. Wrightson* (a), which is subsequent to the case of *Rex v. Darby*, and was very much litigated and spoken to by the best Counsel, and contradicted by no case since, is a different determination: the words there were spoke of a justice of peace in discourse concerning a warrant granted by him, that "he was a fool, an ass, and a coxcomb for making such a warrant, and he knows no more than a slickhill." Upon a demurrer to an indictment for these words the Court at first, upon the authority of *Rex v. Darby*, inclined to think the words indictable, but afterwards determined they were not so, and expressly denied the case of *Rex v. Darby* to be law. The Court went upon this distinction, that where defamatory words are spoken to a justice of peace, in the very exercise of his office, there they are indictable, and consequently subject to an information, because they are an impediment to justice, a breach of the peace, and an immediate reproach to the government for appointing an unfit person to an office which so materially concerns the administration of justice. But where a person reflects upon a justice of peace for an act already done, though done as a justice of peace, it is only a breach of good manners, and he is not subject to an information; for the justice is in such case considered as a private person, and his remedy is by binding the party to his good behaviour, or by an action on the case. The present case refers to an act done, viz. the refusing *Bartholomew* a warrant; so that although words of defamation are spoken of a justice of peace as such, yet they are not subject to an information unless spoken to him in the actual discharge of the duties of his office, and at the time of his doing some particular act as justice. The case of *The Queen v. Wrightson* went very much upon that of *The Queen v. Soley* (b), who was indicted for these words, "He is not fit to be a justice; for if a man is before him, he will give it right or wrong where his affection is:" and it was ruled the indictment lay not.

PAGE, *Justice*, of the same opinion.

CHAPPLE, *Justice*. It has been endeavoured to difference this case from that of *The Queen v. Wrightson* by saying, that the words

(a) 2. Salk. 692.

(b) 4. Ann.

spoken

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against
POCCOCK.

spoken in that case relate only to the understanding of a justice of peace, but here they affect his honesty and integrity; but I am of opinion this makes no difference, for the government is equally reflected upon for putting a fool in office as a knave; and I am of the same way of thinking with my Lord Chief Justice.

WRIGHT, *Justice*. There is a material difference where words are spoken to a justice of peace himself, and where to a third person in conversation, for the latter is not so open or so great an insult as the former. In the case of *The King v. Barrow* (a) a justice of peace committed a person for coining, for which *Barrow* said, "the justice is a rogue and a rascal, and I can prove him so;" and it was held that he was not indictable; but if the words had been spoke to the justice of peace himself, and at the time of exercising his office, they would have been indictable, because a breach of peace.

Let the rule be discharged.

(a) Trinity Term, 1. Geo. 2.

MICHAELMAS

MICHAELMAS TERM,

The Thirteenth of George the Second,

I K

The King's Bench.

*Sir William Lee, Knt. Chief Justice.**Sir Francis Page, Knt.**Sir Edmund Probyn, Knt.**Sir William Chapple, Knt.*} *Justices.**Dudley Ryder, Esq. Attorney General.**John Strange, Esq. Solicitor General.*The King *against* Dr. Bettlesworth.

Case 296.

MANDAMUS to the defendant, who is head of the prerogative court of *Canterbury*, to grant administration to the plaintiff of his wife's goods and effects, &c. The defendant returns, "that one *A. B.* gave to the plaintiff's wife in "her life-time such and such an estate and effects (*prout* in return "to the *mandamus*), and particularly ordered that her then husband, who was the plaintiff, should have nothing to do there- "with, either in his life-time or after her death, and that after "her decease it should go to such person as she should in her life- "time appoint, either by will or otherwise; that the plaintiff's "wife made her will in writing, which they found was duly ex- "ecuted, and thereby gave these effects, &c. to one *B. C.* whom she "made executor, &c. and therefore he cannot grant administration "to the plaintiff."

A *mandamus* lies to grant to the husband administration of his wife's effects, though she have made a will, of property devised to her after marriage, with express power given by the testator for her so to do, without her husband's interference.

And the question was upon this return, Whether administration ought to be granted to the husband, or not?

S. C. 2. Stra.
891. 956. 1117
1118.

There is no doubt here but the husband is entitled to have administration granted to him. The husband, by act of parliament, is the only person entitled to administration to the wife, unless he, by some act of his own, shall part with that right, either before or after

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WORTH.

after marriage, in which case the wife may make a will, or do any act pursuant to the power given her. Now here is no act returned to have been done by the husband to debar him of this right, nor does the will of *A. B.* give her any power to make a will, only at most an appointment in equity of a particular estate, which cannot be done by will; and besides the wife might have some other considerable estate or effects which none but her husband could be entitled to. Therefore

A peremptory *mandamus* must go to grant administration to the husband.

Case 297.

Walton against Jordan.

A bankrupt cannot be discharged on the Insolvent Debtors Act, he having no effects to deliver, they being in the assignees.

IN the insolvent debtors act there is a clause which gives power to a creditor to bring up a prisoner on a petition, and to oblige him to deliver in a schedule of his effects, and so to be discharged.

The defendant procured one of his creditors, without giving notice to any of his other creditors, to bring him up by virtue of this clause, and so he got himself discharged; but at the time of this discharge he was a bankrupt, and had never had any certificate from the commissioners, and therefore was afterwards taken by the plaintiff upon an escape-warrant.

The question was, Whether his discharge under the Insolvent Act, he being then a bankrupt, be good or not?

THE COURT held, that the defendant's discharge was illegal, it appearing that he was a bankrupt at that time, and therefore could not have any goods or effects to deliver up, they being in all the assignees; the consequence of which is, that this was an escape, and therefore he might be well taken up on an escape-warrant.

HILARY TERM,

The Thirteenth of George the Second,

IN

The King's Bench.

*Sir William Lee, Knt. Chief Justice.**Sir Francis Page, Knt.**Sir Edmund Probyn, Knt.**Sir William Chapple, Knt.*} *Justices.**Dudley Ryder, Esq. Attorney General.**John Strange, Esq. Solicitor General.*The King *against* Munocs.

Case 298.

THE DEFENDANT was indicted on the 33. *Hen. 8. c. 1.* as a cheat, for fraudulently getting away from the plaintiff a promissory note, under pretence of getting it indorsed and paid by a person in the next room, which note the defendant got from the plaintiff by false tokens, and under colour and pretence that he would bring her the money for it, whereas he never brought the money nor returned the note again.

In an indictment on 33. *Hen. 8. c. 1.* the false token by which the imposition was effected must be set forth.

S. C. 2. Stra.

1127.

Upon this indictment the defendant was found guilty, and now moves in arrest of judgment, and takes two exceptions to the indictment:

FIRST, That it is not sufficient to say in the indictment that the defendant made use of false tokens, but it ought to be specified in particular what those false tokens were which the defendant used.

SECONDLY, That the using of words and promises only is not sufficient for an indictment, unless the defendant uses some credentials to deceive the plaintiff, as a false key, &c. a letter, or some other visible mark.

And of that opinion was the Court, that it was necessary to lay in the indictment what the false tokens were, and that the making use

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use of words only was not sufficient for an indictment, for the act says false tokens or counterfeit letters.

Judgment was ordered to be staid (a).

The defendant was found guilty upon an indictment, which was, that the defendant came to A. who had a promissory note of five hundred pounds, pretending that he had a friend in the next room who would advance the money for it, whereas there was no such person there, by means of which false tokens he defrauded the said A. of the note, &c.

And it being moved in arrest of judgment, that it did not appear by the indictment that the defendant used any false tokens; and that a charge of using false tokens generally was not sufficient, the Court took time to consider of it; and the last day of the Term,

THE CHIEF JUSTICE delivered the opinion of the Court to this effect: This was an indictment wherein the first count sets forth, that the plaintiff being entitled to a promissory note of five hundred pounds, and the defendant intending to defraud her of it, pretended that he had a friend in the next room who would discount it. The second count charges the offence to have been committed by means of the said false tokens. A motion has been made in arrest of judgment; and the exceptions were, that the first count was but a charge of false affirmation whereby he acquired the note, and there was cited the case of *The King v. Jones* (b), reported by Mr. Salkeld, which I take to be a true account of that case, and which agrees with a manuscript I have seen of that case, wherein is cited a like judgment; *The Queen v. Gratland* (c), wherein it is likewise held, that a false affirmation does not amount to a false token, but that appears to be confirmed by the same fact in the other part of the indictment; and there being no other fact mentioned, it comes to this question, Whether charging a man to come with false tokens, generally, is sufficient, without specifying them? There was no case cited to warrant that general charge: and I apprehend it is not sufficient in an indictment to charge coming with false tokens generally. It is said in 2. Cro. 20. that an indictment charging any with a tort, ought to be precise in the point of the tort. In *Young's Case* (d), where a wound was charged to be given *circa pectus*, &c. it was held to be too general, &c. which shews how precisely the fact, which makes the offence, ought to be expressed. In *Hale's Pleas of the Crown* it is said, that any species of death of the same kind with that in the indictment, may be given in evidence. This is only a general charge, if considered exclusive of the false affirmation. And in *Lev. 299.* where an information was for being *communis perturbator pacis*, &c. the

(a) See 4. Com. Dig. "Indictment"
(G. 3.). 4. Hawk. P. C. ch. 25. f. 57.
2. Hawk. P. C. ch. 71. Rex v.
Mason, 2. Term Rep. 386. Rex v.
Young, 3. Term Rep. 28.

(b) Salk. 379.

(c) Easter Term, 8. Ann.

(d) 4. Co. 40.

charge was held to be too general, though a general charge of barratry is good, as *communis barellator*. Other cases have been likewise cited, as *The King v. Macarty (a)*, *The Queen v. Eddy (b)*, where one man personated another, and pretending to be a soldier received another's pay. Lord Hale says (c), if A. come to B. and by a false message or token receive money of him, it is a cheat punishable by indictment at common law, or upon the statute 33. Hen. 8. c. 1. but that is a very general saying, for it is certain that a parol message or token, by words of mouth only, is not indictable upon the statute 33. Hen. 8. c. 1. unless he be understood to mean a message in writing; for there must be a letter or some false token, a bare affirmation is not sufficient.

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Therefore, upon these grounds, I think it proper that this judgment should be arrested.

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(b) Hilary Term, 10. Ann.

(c) 1. Hale P. C. 506.

Hafwell *Qui Tam* against Shallee and Others.

Case 299.

THE PLAINTIFF, *qui tam*, &c. brought an action on the statute 12. Car. 2. c. 29. against the defendants for retailing wines without a licence; and upon the general issue, *nil debet* being pleaded, the jury, as to part, found a general verdict for the plaintiff; and as to the residue, they found specially, that the defendants are wholesale importers of wine, and paid the duty for the same; that they took the oath, which is, "That they are importers by wholesale, and that the wine mentioned in their entries does not belong to a vintner or retailer." The verdict further found, that the defendants are not free of THE VINTNERS COMPANY; that they sold red port in three dozen of bottles, commonly called quart bottles, to three different persons, but that it was not measured, or by the gallon; and that it was drank in the private families of the buyers. But whether upon the whole matter in form aforesaid found, &c.

If an importer of wine in casks, or a wholesale dealer, sell three dozen of quart bottles of wine, unmeasured, to three different persons for their private use, this is a retailing of wine within the statutes 12. Car. 2. c. 25. and 15. Car. 2. c. 14. And *Quære*, If it is not an offence within 7. Edw. 6. c. 5. f. 8.

S. C. 2. Stra.
1124.
S. C. And 398.

WYNNE, Serjeant, for the defendants, admitted the general question upon this verdict to be, Whether the defendants have been such retailers as ought to have taken out a licence? but argued that such question may be divided into two questions: FIRST, Whether a merchant importer is obliged by the act to take out a licence to retail? SECONDLY, Whether selling wine, in the manner hereby found, is retailing it within the penalties of the act? To bring a case within the act, it is necessary that the wine sold be spent in the seller's house, or in a house in his tenure or occupation; for the words of the act, "to be spent in the house," run through the whole sentence. In *Hard. 339*. LORD HALE says, that the mischief intended to be prevented by the act was not only to hinder disorders in taverns, but also to prevent the number of taverns; and the single point which the Court adjudged in that

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case was, that a man was not licensed to keep a tavern by having a licence to retail wine. It was also MR. BARON TURNER'S opinion in that case, that merchant importer, vintner, and retailer, are synonymous terms. The case of *Astell v. Andrews* (a) differs from the present; the oath is not there found; in that case it was found, that the wine was sold to be spent in an inn; it was a sale by a single gallon, which is prohibited in express terms: here the defendants sold the wine in bottles, unmeasured by any measure; and, instead of being sold to a public inn, the wine was drank in private families.

THE SECOND POINT is, Whether selling wine in this manner is retailing it within the penalties of the act? It is not found that the defendants ever sold a pint, or a quart, or a single gallon, which was the case of *Astell v. Andrews*. The Jury's finding that the defendants sold wine in bottles commonly called quart bottles, is insufficient, for nothing is to be taken by inference or collection in a special verdict (b): and in the case in *Hard. 339.* though a licence to retail wines was in effect to keep a tavern, yet the Court would not intend it to be so in a special verdict.—This finding is also uncertain, for there are several kinds of bottles commonly called "quart bottles;" there is "a soldier's bottle," "a parson's bottle," "a proctor's bottle," and "a fellow's bottle;" and yet these bottles, which are commonly called quart bottles, do in reality hold two quarts. The jury have found that this wine was sold by no measure, and it cannot be intended that it was by measure only, because they find the bottles commonly called quart bottles, which is an uncertain finding: a bottle is no determinate quantity in law, or known measure, which is the manner in which the acts of parliament describe a trader. And the statute 1. Geo. 2. called the Bottle Act, is the only law that mentions bottles; and yet it does not ascertain what is the measure of a bottle, &c.

MR. SOLICITOR GENERAL for the plaintiff. Wholesale importers are clearly within the general words of the act; and it will descend to retailers. The words of the act include any greater or lesser measure. The Serjeant says, that a bottle is no measure; but the general words of the act are designed to take in any kind of measure, though the wine was drawn directly into one without any intervening measure. The case in *Hard. 339.* the Court being divided, can be of no earthly authority in the world. The general question upon this verdict will be, Whether the defendants were such retailers as ought to have taken out a licence? for if they are, they will be liable to the penalty, otherwise they will not. It must be admitted, that at common law wine might be sold by any person, in any proportion or measure, without incurring a molestation, unless the seller kept a disorderly house: this being found to be inconvenient, a remedy was attempted so long ago as in the reign of Edward

(a) 22 Stra. 718. 51 C. Ld. Ray. 1421.

(b) Cro. Car. 549. Show. 539.

the Sixth; for by the statute 7. *Edw.* 6. c. 5. f. 3, 4. retailers of wine are to be licensed, and the wine not to be spent in the retailer's house. The 12. *Car.* 2. c. 25. makes some further alterations, and allows retailing wine within doors, the person having a licence. The 15. *Car.* 2. c. 14. recites the former, and shews that the intention of the Legislature was, that the place where the wine was to be spent should be indefinite, and that it should be licensed, whether spent in or out of the house where it was sold. The difference between a wholesale and retail trader is, that a wholesale trader imports his wine in pipes or hogheads, and sells it in the same manner. What is contended for on the plaintiff's part, is chalking out a way to evade an act of parliament, and would open a door to the practice of selling wine in small quantities, which is retailing. If a wholesale draper cut a piece of cloth, it is retailing it; so if a wholesale grocer sell a pound of plumbs, &c. he retails them. In these kinds of actions, in the city, the general question is, Whether the party cut the piece, &c. or not? for if he did, it is retailing; and I remember a case at *nisi prius* wherein it was so determined. The same objection which has been made here was made at the trial of this cause, *viz.* that it did not appear that the word "bottles" was in the statute, or into what measure the wine was drawn. If, therefore, what the defendants have done is selling by retail, it is within the act, though not in the particular measures specified therein; for the act likewise mentions generally "any greater or lesser measure." The special verdict states the wholesale importer's oath, who swears that the wine entered does not belong to a vintner or retailer; how far the defendants conduct is consistent with their oath, must be left to their own consciences; for the reason of the oath is, that wholesale importers pay less duty; and it is to be feared that they have taken the wholesale oath in order to save that, and yet have made a greater profit in selling by retail. It has been endeavoured to distinguish the case of *Astell v. Andrews* from the present, because there the oath is not found, though THE SERJEANT himself was pleased to say afterwards that the finding of the oath in this case was unnecessary and immaterial; but as that is a case in point for the plaintiff, it is to be hoped it will obtain a judgment in point. The case of *Astell v. Andrews* was an action upon this statute, wherein the jury found the defendant to be a merchant importer at *Bristol*; that he sold one gallon of wine to a person, who carried it to the *George Inn*, in *Bristol*, and that it was drank there; and though it was argued by MR. FAZAKERLY that the defendant had done but one act, and that the wine was spent at another house, and that it was of ill consequence to extend penal laws beyond the express words of them; the Court held that this was a retailing within the act, and judgment was given for the plaintiff.

THE WHOLE COURT inclined, that this was a retailing in the defendants within the statute, and that the act ought not to

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be evaded by the party's making use of the measure of a bottle, or such other measure as he thought proper.

PROBYN, *Justice*, observed, that there was another distinction of a bottle, besides those taken notice of at the Bar, which had not been mentioned, and that was "an honest bottle," which is a quart, whether the measure of it be made of glass or pewter, &c.

THE COURT likewise inclined, that the case of *Astell v. Andrews* was not exactly in point to this case, and ordered this to stand over for another argument.

Afterwards, in *Hilary Term 1739*, in the thirteenth year of *George the Second*, THE COURT RESOLVED, that the selling as afore said was retailing.

An appeal was afterwards brought in the House of Lords, where the judgment was reversed (a), and a *venire de novo* awarded (b).

(a) The reason of this reversal was, because the quart bottles were not found by the special verdict to be a retail measure, S. C. 2. Stra. 1125. But see upon this point a note in Mr. Nolan's edition of *Strange's report* of the same case.

(b) That a court of appeal may award a

venire de novo, see *Knyaston v. Mayor of Shrewsbury*, 2. Stra. 1053. *Parker v. Wells*, 1. Cobb's B. L. 166. 1. Term Rep. 783. *Lickbarrow v. Mason*, 5. Term Rep. 367. *Harwood v. Goodright*, Cowp. 91. *Grant v. Astle*, Dougl. 722. *Bent v. Baker*, 3. Term Rep. 37.

Case 300.

An information will not lie against a churchwarden for not collecting brief-money.

S. C. 2. Stra. 1130.

Ford's Case.

KETTLEBY moved for an information, upon the statute 4. Ann. c. 16. against *Ford*, sole churchwarden of the parish of *Sutton*, in the county of *Sussex*, for not going about the church to collect money upon a *brief*, after it had been duly read in the church, in his hearing, by the *Rev. Mr. Julius Bates*, minister of that place; and he cited the case of *The King v. Perkins* (a), where the Court granted a criminal information upon that statute for burying in woollen; so in the case of *The King v. Harrison* (b).

PROBYN, *Justice*. In those cases part of the money was for the revenue; but in this case it is a private charity, and the method prescribed by the act ought to be pursued. This act only gives a liberty to collect.

LEE, *Chief Justice*. I see no reason to grant an information, unless you mean such an information as the act mentions; or even a rule to shew cause in this case, for the act points out a method. It is sworn, that the churchwarden being at church did not go about to collect; and if he has been guilty of a breach of the act, you may punish him by indictment, if you think fit.

PAGE and CHAPPLE, *Justices*, were of the same opinion.

And the motion was denied by THE WHOLE COURT.

(a) Hilary Term, 9. Geo. 2.

(b) Trinity Term, 1737.

TRINITY

TRINITY TERM,

The Fourteenth (a) of George the Second,

IN

The King's Bench.

Sir William Lee, Knt, Chief Justice.

Sir Francis Page, Knt.

Sir William Chapple, Knt.

Martin Wright, Esq.

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

Sir John Strange, Knt. Solicitor General.

The King against Bigaman and Cockeril.

Case 301.

THIS was a motion for an information against the defendants, Justices for a borough cannot commit to county gaol. as justices of peace for the borough of *Scarborough*; and the complaint was, that, the plaintiff being convicted before them of A RIOT, they sent him to *York Castle*, the county prison, whereas they ought to have committed him to the corporation gaol.

See the statute 15. Geo. 2. c. 24. and 24. Geo. 2. c. 55. 3. Hawk. P. C. 7th edit. ch. 8. page 70.

SECONDLY, That they refused to accept of the bail which was offered them, and notwithstanding sent him to prison.

On shewing cause, the defendants offered in excuse to this charge, that the corporation gaol was in the possession of the other party (there being a dispute in the corporation concerning the election of their magistrates, so that there were two sets of justices, &c.) ; and that if they had committed the plaintiff to that gaol, he would not have been received, and therefore they sent him to the county gaol.

As to THE SECOND CHARGE they alledged, that the persons who were offered as bail were accomplices with the plaintiff, and

(a) See Burr. S. C. 163. pl. 58. note to 2d edition.

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had been concerned in the same riot; for which reason they refused their bail.

CURIA. Though what the defendants have done in this case is not strictly justifiable according to law, as sending the plaintiff to the county gaol, which is not within their jurisdiction, and refusing to admit him to bail, yet as there does not appear that any oppression was intended, it will not be sufficient cause to grant an information; and without that circumstance, the Court always refuses an information against a minister of justice; for the plaintiff is not without other remedy.

The rule for an information was discharged.

Case 302.

The King against Morgan.

The presiding officer at an election under the statute 11. Geo. 1. c. 4. must be the nearest person in place and office to the absent mayor.—And if a charter appoint the election of the mayor to be the next day after a month from the prescriptive day, it means a lunar month after such day.

AMANDAMUS was prayed on the statute 11. Geo. 1. c. 4. against the mayor of *Abervystwyth*, in *Wales*, to go to an election of a mayor, there having been no election at the usual day, nor within the day after, as this act directs.

On shewing cause the defendant insisted, that there was an election, as the act directs, on the day after the prescriptive day, which is proved to be at a court-leet to be held within one month after *Michaelmas-day*; and it is also sworn, that the month has always been computed according to the longest calendar month, which is thirty-one days; so that by this computation the prescriptive day is the thirtieth of *October*, and they went to an election the thirty-first of *October*; and therefore that the *mandamus* ought not to go.

To this defence the plaintiff made two objections.

FIRST, That the month for holding the court-leet ought to be a lunar month, and not a calendar month; and if so, the election ought to have been on the twenty-ninth of *October*; and then this election will not be within the time which the act prescribes.

SECONDLY, That the person who presided at such election does not appear to have any right. It was said, that *Williams*, who was the presiding man, was one of the magisterial officers next in office to the mayor; whereas the act says, he must be the nearest then present in place and office to the mayor; and this man is only said to be one of the nearest.

LEE, Chief-Justice. The affidavits to support this *mandamus* have set forth, that there was no due election. The statute 11. Geo. 1. c. 4. s. 2. which directs the *mandamus*, says, it shall be granted, either if there has been no election at all, or if such election afterwards shall become void. In the *Case of Fintagen (a)*, an

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IN WALES.

election was disclosed; but it appearing that it was a void election, the Court granted the *mandamus*, and said, it was not sufficient to shew the fact of an election only, but it ought to be such an election as the act directs. The question then will be, Whether this will fall within the same reason as *Fintzen's Case*? The act says, that the election made pursuant to this act must be the next day after the charter or prescriptive day. Here it is agreed, that the prescriptive day is at a court-leet held within one month after *Michaelmas-day*; and it is said that this must be computed according to the calendar month, which, according to this computation, will bring the prescriptive day to the thirtieth of *October*, and the election was had on the thirty-first of *October*, the day after. But it is very clear and settled, that when the common or statute law speaks of a month generally, without fixing any number of days, or saying what sort of month, it is meant thereby a lunar month (for it is the ecclesiastical courts that reckon by calendar months); and then this election will be void, not being had the day next after the prescriptive day, which is a lunar month after *Michaelmas*, and should have been on the twenty-ninth of *October*. It is likewise bad on the second exception, for it does not appear that the person who presided on this election was the nearest in place and office to the mayor then present; it is only said he was one of the nearest. Therefore I am not satisfied there has been a good election; and I am of opinion that a *mandamus* ought to be granted.

PAGE and WRIGHT, *Justices*, were of the same opinion.

The *mandamus* was accordingly granted.

Warden against Sir William Rous.

Case 303.

A *MANDAMUS* issued to the defendant, an alderman of *London*, suggesting, that the plaintiff was duly chosen a common-council-man for the ward of _____, in the city of *London*, and commanding him to swear the plaintiff in accordingly, or shew cause, &c.

A freeman of *London* is not deprived of his right of voting for common-council-man by not having paid the *orphans tax*, if it is not demanded of him.

To this the defendant returned, that the plaintiff was not duly elected into the office of common-council; and upon that an issue was joined, and a special verdict found, *viz.* that this is an antient ward, and has a court of wardmote belonging to it, and nine common-council-men. The return then sets out the 5. & 6. *Will. & Mary*, c. 10. which lays a tax on freemen of *London* and others for raising the sum of eight thousand pounds *per annum* towards the maintenance of orphans. It also sets out several clauses of the 11. *Geo. I.* c. 18. f. 8, 9. the purport of which is, "that after the first day of *June* 1725, the right of election of aldermen and common-council-men for the several wards of the city shall belong and appertain to freemen of the city of *London*, being householders paying scot and bearing lot, when required, in their respective wards, and to none other whatsoever, provided that

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"the houses of such householders be respectively of the real value of ten pounds *per annum* at least, and that such householders be the sole occupiers of such house, and have been actually in the possession of an house of such value in the ward where the election is made by the space of twelve calendar months next before such election: and for the better ascertaining what are the rates and taxes to which such householders ought to contribute and pay their scot, the same are hereby declared to be a rate to the church, to the poor, to the scavenger, to the orphans, and to the rates in lieu of or for the watch and ward, and to such other annual rates as the citizens of *London* inhabiting there shall hereafter be liable to, except the annual aids granted by parliament; and if such householder shall have paid his scot to all the said rates and taxes, or thirty shillings a-year to all or some of them, he shall be deemed a person paying of scot:" that at an election for common-councilmen the plaintiff had seventy-six votes, of which thirty-five had not paid the *orphans tax*, but all the other taxes they had paid. They find, that no rate has been made for raising the *orphans tax* since the year 1733; the yearly sum to be raised for the *orphans tax* had been paid out of the city cash to the year 1738; and from that time it has not been paid by the City. And conclude, that with these thirty-five votes the plaintiff had a majority of the candidates; but they refer the right of these voters to the Court.

The question was, Whether a freeman of *London* who has paid all the other taxes except the *orphans tax*, for which no rate has been made since the year 1733, shall, by his not paying this tax, which is not demanded of him, and which is not in his power to pay, be deprived of voting for a common-council-man?

7. Vent, 386.

DENNISON, *for the plaintiff*, argued from the impossibility of his being able to pay a tax for which no rate is made, and that the act of 11. Geo. 1. must be construed to mean only those taxes which are subsisting; and this is not a subsisting one, being never demanded; and likened it to the condition of a bond which is become impossible, and so the bond saved: as where the condition of a bond was to give security for a certain day as the chamberlain of *London* shall appoint, the defendant pleaded that there was no chamberlain of *London* at the day; and held a good excuse, for it was not in his power to make one.

NOEL *for the defendant* insisted, that this was a subsisting tax imposed by act of parliament, and which cannot be dispensed with by the city of *London*; and the words of the act are express, that the right of election shall belong to such as are there described, paying scot and lot, and to none other whatsoever: that the *orphans tax* is not raised, yet it is in the power of a voter to qualify himself by paying thirty shillings in the whole to all or any of the taxes; which clause was added to give those people a liberty of voting, though they had not paid all the taxes, provided they paid thirty shillings in the whole to all or any of them; and it is not found that these thirty-five voters paid thirty shillings in the

the whole. The act intended to abridge the number of electors, and does not take away any right, but only adds a new qualification, which ought to be complied with, either by paying the taxes there mentioned, or the thirty shillings in the whole.

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THE COURT. This case can receive no aid from the statute of 5. & 6. Will. & Mary, c. 10.; for though the city of London might make this a subsisting tax, by making a rate and demanding it properly, yet as they have not done this, it cannot be called a subsisting tax. The statute of 11. Geo. 1. c. 18. intended to abridge the number of electors, by confining the right of election to the most substantial, i. e. to such only as paid those rates therein-mentioned; but then the act must be construed to mean such of them only as are subsisting; for if no rate or demand be made for those taxes, how can they be paid? And as it is not in the voter's power to comply with the first part required by the act, he is not put upon performing the alternative of paying thirty shillings; for if he pay all the rates in being, he does as much as he is obliged to do by the act; for the alternative extends only to one who has not paid all the rates in being, but has paid thirty shillings in the whole; and as no rate is made for this tax, it is a case out of the act, and not taken notice of. Therefore they were all of opinion, that these thirty-five voters were good.

A peremptory *mandamus* was granted.

Shuttleworth *against* Pilkington.

Case 304.

AN ACTION on a bail-bond for the defendant's appearance to a *testatum* on an original. The writ was returnable "in three weeks from the Feast of St. Michael, wheresoever our Lord the king shall be in England;" and the condition of the bond was, "to appear on the return thereof before the king" generally, without saying, "wheresoever he shall be in England," as the writ is. The defendant pleads 23. Hen. 6. c. 10. which directs, "that no sheriff shall take, or cause to be taken, any obligation of any person in their ward by the course of law, but by the name of their office, and on condition written that the said prisoners shall appear on the day contained in the said writ or warrant, and in such places as the said writs, bills, or warrants, shall require;" and then pleads, that the bail-bond was taken *colore officii*, and for ease and favour, and not pursuant to the statute. To which there was a demurrer and a joinder.

A sheriff's bond
"to appear be-
"fore the king"
generally, is
good, although
the writ was
"to appear on
"such a day,
"wheresoever,"
" &c."
S. C. 2. Stra.
1135.
1. Term Rep.
240.
Tidd's Pract.
106, 107.

STRANGE, *Solicitor General*, insisted for the defendant, that this bond was void on account of this variance between the return of the writ and the condition of the bond; the former being "to appear before the king wheresoever he shall be in England," whereas in the latter it is said only, "to appear before the king," omitting the words "wheresoever he shall be in England;" and cited *Sawyer v. Mitton* (a), *Tildon v. Weedon* (b), and *Sir M.*

(a) Mich. 12. Geo. 1. in B. R.

(b) Easter Term, 1, Geo. 1.

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WORTH
against
PILKINGTON.

Moore v. Peter Penthouse, in the petty-bag-office, to shew, that the legal and customary forms used in the return of writs must be kept up, and that to recede from them is fatal.

DENNISON *contra* agreed, that the usual forms of writs, and their returns, ought to be pursued; but that this was not an objection to the return of the writ, but to the bail-bond taken on a good writ; and he said, that bail-bonds were taken to prevent extortion, and ought not to be so strictly construed as they have been, in which no particular form of words are necessary; and cited *Cro. Jac.* 286. *Villers v. Hastings.* 2. *Vent.* 237. 2. *Show.* 51. 2. *Levin.* 180. and *Phillips, Assignee, &c. v. Alexander*, Trinity Term, 3. & 4. Geo. 2. in the exchequer, where a bail-bond was taken on a *quominus* returnable before the barons of the exchequer at *Westminster*, and the condition of the bond was to appear in the office of pleas in the exchequer at *Westminster*; and the Court held the bail-bond good, though the condition varied from the express words of the return of the writ.

THE COURT all held, that this variance between the writ and the condition of the bond was not material, for the Court does not require such particular forms in bail-bonds given to the sheriff. The sense of the writ is, "to appear before the king in his court;" and we must understand the bond in the same sense, to appear in this court, where the king is supposed to be present; and therefore held the bail-bond to be good.

Judgment was given for the plaintiff.

Case 305.

Talbot against Hubble and Others.

If the charter of a city give to the justices an exclusive jurisdiction, the justices for the county cannot interfere.

ACTION OF TRESPASS against the defendants for breaking and entering the plaintiff's house in *New Sarum*, and carrying away and detaining several goods mentioned in the declaration, and keeping them till paid the sum of six pounds. The defendants pleaded "not guilty;" and on the trial a special case was made for the opinion of the court of king's bench.

S. C. 2 Sra.

1154.

3. Hawk. P. C. 7th edit. ch. 8.

f. 48.

The case states, That the plaintiff is a public-house-keeper within the city of *Salisbury*; that the defendant *Hubble* is an officer of excise; that the defendants *Harris* and *Pitts* are justices of the peace for the county of *Wilt.*, the one residing in, another in a close adjoining to, the city of *Salisbury*; and that the other defendants are constables for the said city: that the defendant exhibited an information against the plaintiff, before the defendants *Harris* and *Pitts*, for having a quantity of run tea concealed in his house: that upon this the justices condemned the tea, and fined the plaintiff the sum of six pounds, which was the treble value of the tea, and granted their warrant to the other defendants, the constables, to levy the same;

same; and that they, in pursuance thereof, entered the plaintiff's house, took his goods, and detained them till paid the said sum of six pounds: that all the proceedings were regular on this information, if the defendants, the justices, have a sufficient jurisdiction to convict the plaintiff in this case for an offence agreed to have been committed within the city of *New Sarum*, for that this city, by several charters from the crown, has thirteen justices of its own, who have power to hear and determine all matters and offences arising in the said city; in which charters there are several exclusive clauses, whereby the justices for the county at large are precluded from intermeddling in any matter arising in the city of *Salisbury*, or within the jurisdiction of the city justices: that the justices for the city have always held the quarter-sessions there, and that informations relating to the excise have been frequently made before the justices of the city, where the matter arose in that corporation; and that it did not appear that the justices for the county had ever exercised any jurisdiction in the said city for any fact arising there, whether it related to the excise or otherwise: and that it appeared on the oath of the town-clerk, who had been in the office for thirty years, that the county justices never intermeddled in city matters; and that he could not find one entry in any of the Books to shew they ever had.

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THE QUESTION reserved for the consideration of the Court was, Whether the defendants *Harris* and *Pitts*, being justices of the peace for the county of *Wilts*, the one residing in, and the other near, the said city of *Salisbury*, had a legal and proper authority and jurisdiction, under the circumstances of the present case, to proceed on the information exhibited before them by the defendant *Hubble* as aforesaid, for the said offence committed within the said city by the plaintiff, then residing within the said city, and to grant their warrant, upon the said information, to levy the penalty within the said city.

The case was argued three several times at the Bar, where these four points were principally spoke to.

FIRST, Whether THE CROWN can grant an exclusive jurisdiction?

SECONDLY, Supposing THE CROWN can, Whether the several charters granted to the city of *Salisbury* do contain such an exclusive jurisdiction?

THIRDLY, If THE CROWN have such a power, and the charters do contain such an exclusive clause, Whether the statute of 12. Car. 2. c. 23. s. 31. is a virtual repeal of these charters, so as to let in the justices for the county at large, in any matter relating to the excise?

FOURTHLY, Whether this action of trespass is the proper remedy for the plaintiff? for it was objected, that if the justices for the county at large have no jurisdiction within the city of *Salisbury*,

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an action on the case ought to have been brought against them for exercising an illegal jurisdiction; and not an action of trespass.

LEE, *Chief Justice*, this Term delivered the opinion of the Court, in which he took notice of all the principal arguments at the Bar, and stated the case as above.

I think the first consideration will be, Whether the charter-justices of *New Sarum* have a jurisdiction in their city exclusive of the justices for the county of *Wilt*s; for if there be no exclusive words in their charter, there is no foundation to say that the justices for the county of *Wilt*s have not a concurrent jurisdiction with the corporation justices within the city of *Salisbury*. And that they have this concurrent jurisdiction appears from *H. H. Pl. Coron. fo. 47.* where it is said, that "if the king by charter grant to a corporation that the mayor and recorder shall be justices of the peace within the city, whereby they are justices in perpetuity by charter, yet, if there are no words of exclusion, the justices of peace for the county have a concurrent jurisdiction with the justices by charter."

The next point will be, Whether here is an exclusive jurisdiction given by these charters to the justices of *New Sarum*?

The exclusive clauses in the several charters are in almost the same words (which he stated at large), and are to this effect: "That the justices of *New Sarum* shall have jurisdiction to determine all matters arising within their city in as full and ample a manner as the justices of the county of *Wilt*s, or any other justices of the peace of our lord the king, can determine any matters within their respective jurisdictions, either by virtue of their commissions, or of any act of parliament already or hereafter to be made; and that the justices of the peace for the county of *Wilt*s shall not hereafter intermeddle themselves, or have any manner of jurisdiction of any causes or matters arising in the said city of *New Sarum*, or within the cognizance of its justices." By this clause I apprehend, that the crown has excepted *New Sarum* from the concurrent jurisdiction of the justices of the county at large, as absolutely as if there had been an express clause of exclusion in the commission to the county-justices commanding them not to intermeddle with any matters arising within the city. The clause in the charters of *New Sarum* is to empower its justices to do not only what the county-justices could do by any act of parliament then in being, but also what such county-justices should be enabled to do by virtue of any subsequent act of parliament. And this will be an answer to the case in *Brooke*, where it was held, that the city of *Bristol* should not have the cognizance of a plea in an action for maintenance, because their jurisdiction arose from a grant of *King Edward the Third*, and the action of maintenance is given by a statute of *Richard the Second*, which is subsequent to the grant, and was not *in esse* at that time; but there is a *quære* to it by *Brooke*. But the present case differs; for the charter justices

are, by exprefs words, to have jurisdiction in all matters arising on subsequent acts, as well as on acts already in being.

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But if it be doubted, Whether the crown has power to grant an exclusive jurisdiction, that will be settled by this *Case of the Abbot of St. Alban's* (a), where it is said, that if there is a clause of exclusion, the justices of the county have no jurisdiction in that corporation, &c. And it is also said by READ, *Justice*, in that case, that an indictment before the county-justices, for a matter arising within the exclusive jurisdiction, is void, as being *coram non judice*; and the clause in the justices commissions which says they are to act *tam infra libertates quam extra*, means only as to such places where the justices of these liberties have no exprefs clauses in their patents to exclude them; for where there are no such exclusive clauses, there is no doubt but that the county-justices will have a concurrent jurisdiction (b). And READ goes on, "and since the king wills that the justices for the county at large should not intermeddle, he has by that divided the jurisdiction of his justices, which he may well do; as in 2. *Inst.* 71. it is said, the king may well divide the jurisdiction of his courts." And PHINEUX, *Chief Justice*, adds, to what READ has said, "that if a person be indicted before justices of a county, who act in a liberty which has its own justices, and a jurisdiction to exclude the county-justices, the indictment may take advantage of this, because it is void, as being *coram non judice*; though it is objected, that the offence is only done to the lord of that liberty for an infringement of his franchise." In this case it appears, that an exempted jurisdiction is compared to a franchise of *retorna brevium*; and THE CHIEF JUSTICE treated it as a thing done *coram non judice*. But I think there is a great difference between them; for though the franchise of *retorna brevium* carries an exemption, yet it does not exclude but that the sheriff may execute writs within it; but then it is a wrong for which the lord of the liberty may have his action; and in some cases the sheriff may lawfully do it (c); as in the case of the king, a *non omittas*, &c.; and the defendant who is served with process by the sheriff within a liberty shall never take advantage of this, but the lord whose franchise is infringed; and a liberty is always for the benefit of a stranger, and not of the defendant (d). But in case of an exempted or exclusive jurisdiction, the benefit is for persons living within that jurisdiction; and I do not know of any case that has been determined contrary to that in 20. *Hen.* 7. 6. Indeed HALE, in this case, says, "it has been doubted whether an indictment at the sessions held by the county-justices in an exclusive jurisdiction be void, or only a contempt in the justices." And says also, that this matter was moved between the justices of the peace for Surrey and the borough of Southwark;

(a)

(b) 1. H. H. Pl. Coron. 47. Dal-

ton, 24.

(c) 1. Vent. 406.

(d) 5. Co. 92. b. Semayne's Case.

but

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but never resolved (a) ; but that some thought it like the case of a bailiwick of a liberty, and a *retorna brevium* granted *ita quod vice comes non intret*. If a sheriff execute a writ within the liberty, the execution is good, but the sheriff is punishable for infringing the franchise. But in the case of *The King v. Grey* (b) it was held by three justices, though there was no express opinion, that if a *præcipe* be brought for land lying in the county-palatine of *Lancaster*, and the *præcipe* issue out of the common pleas, and judgment there, such judgment will be void, for the county-palatine is an exempted jurisdiction from the king's courts at *Westminster*, and has itself a plenary jurisdiction (c). But in the case of *retorna brevium* the court that issues the process has jurisdiction in the liberty ; and when the writ is executed, it is good to all intents and purposes against the defendant, and the lord is the only person who is to take advantage of the irregular execution of the writ, which is a breach of his franchise.

Taking it then that the crown may, and in the present case has, granted an exclusive jurisdiction to the justices of *New Sarum*;

The next question will be, Whether the statute relating to the excise within the city of *New Sarum* admits the jurisdiction of those who in other cases are excluded ? And this depends on the 12. *Car. 2. c. 23. s. 31.* and 15. *Car. 2. c. 11.* As to the 12. *Car. 2.* the words are, "that all forfeitures and offences against the said act shall be determined in this manner : those which arise within the immediate limits of the chief office in *London* shall be determined by the commissioners or governors of the excise ; and all such forfeitures and offences made and committed within all or any other the counties, cities, towns, or places, within this kingdom or dominions thereof, shall be heard and determined by any two or more of the justices of the peace residing near to the place where such forfeiture shall be made or offence committed ; and in case of neglect or refusal of the justices, by the sub-commissioners : and if the party find himself aggrieved by the judgment given by the sub-commissioners, he may appeal to the justices of the peace at the next quarter-sessions, &c.

It was insisted on by the Counsel for the defendants, that the county-justices might act in *New Sarum* in this case ; for all that was required by this act is, that the persons who are to exercise this jurisdiction in excise matters be justices of the peace, and residing near the place where the fact is committed ; and that they act as by a particular designation of parliament, under a *descriptio personarum*, without any relation to their jurisdictions as justices ; and that the same power is given to the sub-commissioners under the like description. But upon perusal of the several statutes we are all of

(a) See the case of *Rex v. Sainsbury*, 4. Term Rep. 456. S. C. Nolan's Rep. 15. *Rex v. Morgan*, Cald. 156. *Blankby v. Winstanley*, 3. Term Rep. 279.

(b) Clayt. 120.

(c) 21 Inst. 557.

opinion, that the design of the Legislature was to vest the laws of excise in the several justices of the said respective cities, counties, &c. respectively, according to the legal jurisdiction which they exercise over other matters which are cognizable by them. This will depend on the several clauses in the Excise Acts. In the 12. Car. 2. c. 23. s. 29. there is a clause which relates to the farming the excise, and enacts, "that the lord treasurer, commissioner, &c. shall not agree with any person in any of the respective counties or places of this realm in any other manner than as shall be directed by the justices of the said counties or places, or the major part of them, at their quarter-sessions." Here the direction of farming is confined to the justices of the said counties, towns, cities, &c. and the justices of that respective county or place where the duty arises are the persons meant by the act of parliament.

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The next clause (sect. 39.) is that which gives the jurisdiction to punish for the forfeitures and offences in the act, and gives the penalty in the present case. The words are, "that all forfeitures and offences committed within all or any other the towns, counties, &c. shall be heard and determined by any two or more of the justices of the peace residing near to the place where such forfeiture shall be made or offence committed." Here the word *respective* is dropped (which is inserted in the twenty-ninth section). But this clause must have the same construction as the others, and must mean the respective counties and places where the offence was committed; and then the words "two or more justices residing near to the place" must have the same construction, viz. that they are of the same division, and have jurisdiction there. The design of the act is plain to fix this jurisdiction in some certain set of men of that county or place where the fact arose, and not where they are barely resident; and some words must be supplied to execute this intent; for according to the strict words of the act, it gives no more jurisdiction to the justices of the county of *Wilt*s in a matter *without* their county, than to the justices of *Northumberland* or any other justices who happen to be residing near the place where the offence was committed, which could not be the intent of the Legislature; and therefore such construction must be made on this act as to confine this jurisdiction to those justices who, according to the common and regular method of proceedings by justices of the peace, have a jurisdiction in other matters in the place where the offence arose; and the clause which gives the appeal makes it the stronger; for the appeal is given to the justices at the next quarter-sessions; and if the justices of the county of *Wilt*s have a concurrent jurisdiction with the justices of *New Sarum*, it will be uncertain to which of the quarter-sessions the appeal must be made, for it names neither in particular; and the act would be more particular in the description of the sessions, unless it intended to confine the jurisdiction to those justices who have the ordinary jurisdiction in the town or place where the offence arose; in which case

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case this clause will be sensible and plain without any other description. There are several acts of parliament penned in this way; as 15. *Rich. 2. c. 2.* of forcible entries, which gives power to the justices of peace, or any of them; the 18. *Eliz. c. 3.* of bastardy, which gives power to justices near the parish-church; the 13. *Car. 2. c. 10.* for killing deer; and does not say where the fact is committed; the 13. & 14. *Car. 2. c. 6.* for repairing the highways, &c.: in all which cases, and many others, the jurisdiction is given to the justices, but no mention is made that they should be of that county or place where the fact is committed. But yet the rule of construction has always been, *reddendo singula singulis*, to give the jurisdiction according to the respective divisions or counties of the justices; and the 15. *Car. 2. c. 11.* shews the Legislature had this intention in view, for it directs the justices should meet in their respective divisions; from which it follows, they must have jurisdiction there. It has been objected to this construction, that there is a clause in the 15. *Car. 2. c. 11.* which enacts, "that no commissioner, farmer, or subcommissioner for the excise, or common brewer of ale or beer to sell, or innkeeper, shall have power to act in or execute as a justice of the peace any of the powers, clauses, or things, contained in any of the laws made for or concerning the excise." And it is said, that in boroughs or towns it is a common thing to have brewers for justices; so that if all the justices in an exclusive jurisdiction should be brewers, &c. there would be a failure of justice (a). The answer I would give to this is, that this defect does not appear in the present case, nor is there any reason to suppose it here; for it is found, that there are thirteen justices for the city of *Salisbury*; and if it should happen that they were all brewers, &c. the king would in such case grant concurrent commissions to some others to be justices in *New Sarum, ne populi deficerent in justitiâ exhibendâ*, as in *Dalton*, 10.; or there would at least be a remedy by applying to parliament; and therefore there is no occasion to let in the county-justices on this supposition.

Another objection is made on these cases by the defendants, where an act of parliament has been construed to give justices of the peace a power of acting out of their county by way of *descriptio personarum*. But the cases do not come up to the present; for in the case of *Cro. Car. 213* the justice acted only in a matter of examination to entitle the plaintiff to an action on the statute of *Winton* on a robbery; and the Court looked on that statute not as giving the justice any jurisdiction, but that he acted only under a *descriptio personarum*; and it was there agreed, that if the act had been for the exercising any compulsory jurisdiction, the justices could not have acted out of their county. And HALE (b) doubts

(a) But now by 24. Geo. 2. c. 40. s. 22. no person or persons whatsoever being a common brewer of ale or beer, or innkeeper, distiller, or other dealer in spirituous liquors, shall act as a justice of the peace.—See 3. Hawk. P. C. 7th edit. ch. 8, s. 41.

(b) Hale's H. P. C. 50.

whether

whether a justice may do a voluntary act out of his jurisdiction, as to take a recognizance out of the county by consent of the parties; but he lays it down as a general rule, that a compulsory jurisdiction cannot be executed out of the county, such as to compel a person out of the county to enter into a recognizance, and to commit him for not doing it: and though, in an act of parliament, no place is mentioned where the justice of peace is to exercise his authority, yet the law puts this construction on it, that it must be in the county where the fact arises, and where he has jurisdiction: and this construction must necessarily be made on the present case, or else it will not appear who is to have jurisdiction; for it was allowed on the several arguments to be absurd to vest this power over the excise in any justices who were accidentally resident near the place, and who had otherwise no jurisdiction there; as suppose in the justices of *Cumberland* who should happen to live for a time near *Salisbury*. The commissioners act by a plain designation for that particular purpose, and so would the justices at large if they were under the same particular description: but then the question is, What is meant by "justices residing near the place?" And we are of opinion, that by this those only are meant who have an ordinary jurisdiction in the place where the fact arises.

WE ARE, therefore, ALL OF OPINION, that the justices of *New Sarum* have, by their charter, a power to act there exclusive of the justices for the county at large; and that the statutes relating to the excise have given to the county-justices no power to act in *New Sarum*, or in any exclusive jurisdiction.

Therefore the plaintiff must have the *posse*, and his judgment.

Roe against Roe.

Case 306.

ON A WRIT OF DOWER, the defendant came on the first return of the summons, and pleaded *tout temps pris*. Upon which there was a writ of seisin, and a writ of enquiry of damages.

The question was, What damages the demandant was entitled to?

THE COURT. She is entitled to damages from the *teste* of the original to the writ of enquiry; she loses it from the death of her husband to the *teste* of the writ: and this has been settled in the case of *Spiller v. Andrews*, in *Hilary Term*, in the eighth year of *George the First*; and in *Dobson v. Dobson*, in *Easter Term*, in the seventh year of *George the Second*; though *Ca. Lit. 326. is contra*.

If a defendant in dower appear and plead *tout temps pris*, the demandant shall have damage from the *teste* of the original writ of enquiry.

Case 307.

Boyer against Bampton.

If a note of hand be given for a gaming debt, no action will lie thereon by an indorsee against the drawer, although he paid a valuable consideration for it, and was ignorant of the cause for which it was given.

ACTION ON SEVERAL NOTES by an indorsee against the drawer, and a special case made at the assizes, "That in February 1736 the plaintiff purchased these notes for a valuable consideration, but that they were given by the defendant to one *Waters and Child*, for the securing to them several sums of money which were knowingly advanced and lent by them to the defendant to play with at dice; and that these notes were indorsed by them to the plaintiff, who was not privy to the consideration for which the notes were given."

The question was, Whether the defendant is chargeable with the sums mentioned in these notes on the circumstances of this case?

S. C. 2. Stra. 1155.

Salk. 344.

Carth. 356.

5. Mod. 175.

Comy. 4.

12. Mod. 96.

Dougl. 741.

4. Com. Dig.

4. Justices of

"Peace" (B.

42.).

4. Bac. Abr. 65.

2. Burr. 1180.

1. Black. Rep.

245.

2. Term Rep.

439.

By the 9. *Ann.* c. 14. it is enacted, "that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, &c. where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming, or playing at cards, dice, tables, tennis, bowls, or other games, or by betting on the sides or hands of such as do game, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever."

DENNISON and SIR THOMAS ABNEY for the plaintiff argued, that though these notes, by the statute, would be void between the loser and the winner who were privy to this transaction, yet the plaintiff being an honest creditor, without notice of any fraud, and having paid a valuable consideration for them, ought not to suffer by it, but that the notes are good as to him, and by the indorsement are become new notes, and especially as the defendant himself is *particeps criminis*, and by this means will be a gainer by his own illegal act; and cited *Cro. Jac.* 32. and *Yelv.* 47. on the statutes of Usury, where the plaintiff not being privy to the usurious contract, the security was held good as to him; 2. *Mod.* 279. and the latter part of the case of *Hussey v. Jacob* (a), where it is said, that if the bill had been assigned to a stranger on a good consideration, he had not been within the statute, for he had not been privy to the tort, but an honest creditor; though the principal case is against the plaintiff. That in the case of a fraudulent conveyance, it is void as to a purchaser for a valuable consideration without notice, and as against creditors *bona fide* by the statutes of 13. *Eliz.* c. 5. and 27. *Eliz.* c. 4.; but yet the conveyance is very good as against the party himself, for he is *particeps criminis* (b): so here the note may be

(a) 1. Salk. 344. Carth. 356.
3. Mod. 170.

(b) Vide *Cro. Jac.* 270. *Yelv.* 296.

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good with respect to the plaintiff, who is indorsee for a valuable consideration, though not as to the winner of the money, who is *particeps criminis*. It would tend to the discouragement of trade; for a person who pays a valuable consideration for a note in the course of trade, and has it indorsed to him, cannot know on what consideration that note was originally given.

THE SOLICITOR GENERAL and FLOYD *for the defendant*. The act of parliament was made for the benefit of the loser, and expressly directs, that all securities, &c. given for the repaying any money knowingly lent or advanced to play with, shall be void to all intents and purposes; and if this note was void in its creation, no indorsement on it afterwards can possibly make it good; for if it is void to all intents, it is void to every intent. The case of *Hussey v. Jacob* (a) is express in point, and was determined on this foundation, that the contract was illegal and tortious, and not on the plaintiff's being privy to it; which, though mentioned by *Cartwright*, is not mentioned as the ground of that judgment. The construction which the plaintiff contends for will entirely evade the statute of gaming; for by indorsing the note to a friend, and getting him to put it in suit, by this means a security will be made good which the act says shall be "void to all intents and purposes;" and cited 1. *Vent.* 253. 2. *Levinz.* 94. The rule is *caveat emptor*, and the plaintiff is not without his remedy, for the indorser is liable to satisfy him for the money he has received of him for the note.

LEE, *Chief Justice*. The words of the 9. *Anne*, c. 14. are very strong; and this case falls within the express words of it as to making the note itself void. It is agreed, that the intention of the act was to take away from the winner and lender of money to be played with any advantage they might receive from the loser's or any other security: but then it is said, that these strong words of making "all such securities void" are to be confined only to the winner or lender; but I doubt that by this construction such intention cannot be effected, for it is all one as to the winner from whom he receives his money; so that his indorsing it to another person will be rather an advantage to him. As to the cases in *Cro. Jac.* 32. and in *Yelz.* 47. they do not come up to the present case; for the reason of the Court's giving judgment in these cases in favour of the securities, was by construing them out of the statutes of Usury; for they did not consider it as a bond given to the plaintiff on an usurious contract, but for a just debt as to him; and the usury was between the defendant and another person. So likewise was that in 2. *Mod.* 279. determined on the same foundation. There is no case cited like the present but that saying of LORD HOLT'S in the case of *Hussey v. Jacob*, for the case itself is not to the purpose; and in that case HOLT is reported to have said, that if there had been an indorsement on the bill, and an action had been brought by the indorsee, it would be of another consideration. I have seen another statement

(a) *Cartw.* 356.

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of that case, in which he is reported to have said the same thing; but it was very much wondered at; and the case of the fraudulent conveyance was mentioned as a similar case to that saying of HOLT'S; but I do not see how they are alike; for though it is voluntary, yet at law it is a good conveyance, only made bad by the statute as to a purchaser for a valuable consideration. But this case falls within the express words of the act of parliament, which has made it "void to all intents and purposes;" and it would be a very hard construction to determine it contrary to the statute. A construction on either side will be attended with inconveniences, as on the one hand in the case of trade, and on the other a contrary construction will entirely evade the act of parliament, and encourage gaming. And I think the inconveniences on this side are the strongest. Therefore, as no case has been cited to prove the distinction that the note shall be void as to the winner, and not so as to the indorsee, I am of opinion, that the plaintiff cannot recover against the defendant on these notes; the consequence of which will be, that the plaintiff must pay the costs of a nonsuit.

PAGE, *Justice*, was of the same opinion.

CHAPPEL, *Justice*, of the same opinion; and said, that he thought the greatest discouragement ought to be given to any security on account of gaming, for a man who loses only what money he has about him may not be ruined; but if the giving securities on these occasions be once encouraged, there would be no end to his losses till he has no more to lose.

WRIGHT, *Justice*, of the same opinion; for if the drawer be liable to pay the note to an indorsee, it is not "void to all intents;" and in the case of *Cureden v. Leland* (a) it was held, that one who served under an indenture without stamps could gain nothing by it; for the act says, "it shall be void to all intents, &c." Here is no room for any construction or distinction on this act, for it is express; and if any objections are made, they must be made to the act itself, for a different construction would entirely evade it.

Judgment for the defendant (b).

(a) *Easter Term, 4. Geo. 2. 1. Conit's* (b) See *Hincey v. Jacob*, 5. Mod. 175.
Poor Laws, 143.

Case 308.

Heathcott against Goslyn.

An affidavit to hold to bail must be positive and certain.

S. C. 2. Stra.

11:7.

See Tidd's

Pract. 39, 40,

41.

I was moved, that the defendant might be obliged to put in special bail on a bottomree-bond taken on the ship *Suffex*. The affidavit on which the writ was taken out was to this effect, "That the sum of two thousand five hundred pounds is due to the plaintiff from the defendant by bond, as by the said bond appears."

THE COUNSEL for the plaintiff offered to verify by affidavit some facts concerning the ship's being lost, and to explain this affidavit; but

but the reading these affidavits was opposed by the defendant's Counsel, as also the taking special bail.

HEATHCOTT
against
GOSLYN.

THE COURT. The method is to determine the right of special bail on that affidavit only which was made before the process taken out, and not to admit of supplemental affidavits on either side (a). It must also appear, that a sufficient debt is actually due, which does not appear here except by reference to the bond (b), and on the bond nothing appears to be due, for it is due only on a contingency, and it does not appear whether the ship is lost or not.

Therefore it was held, that special bail ought not to be taken.

- (a) See 1. Barnes, 66. 2. Barnes, Martin, 3. Burr. 1447. Rio v. Be-
58. 81. 84. 2. Black. Rep. 840. fantè, 2. Stra. 1209. Barclay v. Hunt,
Turner v. Warren, Andr. 70. Ein- 4. Burr. 1995. Warbeck v. Wheeler,
merison v. Hawkins, 1. Wilk. 335. Barnes, 200. Kelly v. Devereux, Say.
(b) Anonymous, 1. Wilk. 121. Rol- 59. Powel v. Porterbeck, 2. Term
lin v. Mills, 1. Wilk. 279. Jennings v. Rep. 35.

The King against Nance.

Cafe 309.

INFORMATION, in nature of *quo warranta*, against the de-
fendant for illegally exercising the office of mayor of Gram-
pound, in the county of Cornwall.

If a mayor be
chosen on the
day prescribed
by 11. Geo. 1.
c. 4 it is suf-
ficient to swear
him in before the
presiding officer
as the statute re-
quires, although
by the constitu-
tion of the bo-
rough a new
mayor is to be
presented at the
next court leet,
and sworn in
before the town
clerk.

The defendant, by his plea, set out the constitution of the bo-
rough; that it is a borough by prescription, and consists of a
mayor, eight capital burgesses or freemen, and an unlimited num-
ber of free burgesses or freemen; that the custom is for the mayor,
capital burgesses, and freemen to meet on *Sunday* next before
Michaelmas-day, in the town-hall, to chuse a mayor; and that the
capital burgesses, or a major part of them, nominate two capital
burgesses, other than the standing men, to the mayor, who strikes
out one of them, and that the remaining capital burgesses and the
standing men are then put in nomination for the freemen to chuse one
of them mayor for the ensuing year; and then he pleaded, by way of
averment, that the standing man is he who was put in nomination the
last year, but not chosen. The plea then set out the fact of this elec-
tion: "That on *Sunday* next before *Michaelmas*, bring the twen-
"ty-eighth of *September*, there was no election of a mayor accord-
"ing to the custom; and on *Monday* the twenty-ninth of *Septem-*
"ber, one *Pierce*, the defendant *Nance*, and one *Moore*, three
"capital burgesses, and a great number of free burgesses met to
"chuse a mayor, according to the statute; that at that assembly
"no mayor appeared, and that *Pierce*, who was the senior capital
"burgess then present, and the nearest in place and office to the
"mayor, presided at that assembly; that *Pierce* and *Nance*, the
"defendant, nominated themselves, and *Pierce* struck off himself;
"and that *Nance*, the defendant, and *Moore*, who was the standing
"man, were put in nomination to the free burgesses, who chose
"Nance the mayor for the year ensuing; that *Nance* afterwards,
" before

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against
NANCE.

"before his admission, took the oaths of office before *Pierce*, who
"presided at the election;" and so warrants the defendant's claim
to be mayor.

The king's coroner, in his replication, admits the constitution
as to the manner of election, but states a further part of the
custom with regard to the swearing, "That the person so elected
"ought to be presented at the next court leet, before the jury of
"the court, which is holden always within one month after
"Michaelmas yearly, and to be sworn in and admitted before the
"town-clerk or his deputy at such court, in the presence of the
"preceding mayor; and that the defendant *Nance* was not pre-
"sented at the court leet nor sworn thereat."

Several other issues were joined, and a verdict for the defendant
in all of them; but as to this part of the replication relating to the
presentment and swearing, there was a demurrer and joinder.

The question, on arguing the demurrer, was, Whether as the
defendant *Nance* was chosen on the day prescribed by the statute of
11. Geo. 1. c. 4. and not on the prescriptive day, it is sufficient that
he be sworn before the presiding officer at that election, without
being presented at the court leet? or, Whether the presentment or
swearing at the court leet be necessary after an election pursuant
to the act of parliament?

THE COUNSEL for the defendant insisted, that as this election
was on the day prescribed by the act of parliament, the directions
of the act must be followed; and that the usage of the borough,
supposing an election had been on the prescriptive day, will be en-
tirely out of the case. Before this act it was a question, whe-
ther the corporation was not dissolved if the mayor had no power
of holding over, and an election had not been made on the pre-
scriptive or charter day? And to assist this a writ was framed on
the statute of *Westminster the Second*, c. 25. to put them again in
motion after this omission; for the mayor's office being then at an
end, it was a doubt whether they could act without a head. To
remedy these inconveniencies the statute of 11. Geo. 1. c. 4. was made,
which provides for an election after the prescriptive or charter day.
The first section recites the inconveniencies which often prevented
an election on the charter or prescriptive day, and directs an elec-
tion on another day, and in what manner and before whom. The
second section gives a *mandamus* from the king's bench to any of-
ficers of the corporation, requiring them to attend such election.
The third section directs a *mandamus* to the court leet, requiring
them to hold a court, in order to swear in any mayor or other
head-officer, if necessary. The fourth section relates to the swear-
ing, and is as follows: "That the mayor, bailiff or bailiffs, or
"other chief officer or officers who shall be elected pursuant to
"the directions of the act, shall take the oath or oaths by law re-
"quired, at the time of his admission into such office, before such
"officer as shall preside at such election, in pursuance of this act,
"who

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"who is hereby required and authorized to administer such oath or oaths, and shall have the same privileges, precedence, powers, and authorities, in all respects, as any mayor, bailiff or bailiffs, or other chief officer or officers of the same city, borough, or corporation, elected on the days or times fixed by charter or usage for that purpose, ought to have or enjoy." That this clause gives the presiding officer the same power on the statute day of swearing the new-elected mayor, &c. as the court leet would have had if the election had been on the charter or prescriptive day, and is not only directory but compulsory; and that the clause which gives a *mandamus* to the leet to hold a court for the swearing, is to be construed *reddendo singula singulis*; that is, when the election is on the prescriptive day the swearing must be at the leet, but when on the statute day before the presiding officer.

IT WAS ARGUED *for the king*, that by the swearing before the presiding officer the lord of the leet will be deprived of his franchise without any default in him, but merely by the default of the preceding mayor in not going to an election on the prescriptive day. The election, it is true, must be wholly either according to the usage, or according to the act of parliament, and ought not be blended one with the other; but the election and the swearing are different and independent things; and the one may be according to the statute, and the other by the common law according to the usage; which the lord of the leet ought not to be deprived of, without some default in him. The question therefore will be, Whether the constitution being broke into in one instance, ought not to be so likewise in another? And, Whether the presiding officer on the statute day is to have a greater power or authority than the mayor would have had on the prescriptive day? He is not complete mayor till sworn, and by the usage of the borough he is not to be sworn till one month after this election; then supposing the presiding officer on the statute day is to have a power of swearing immediately after the election, this absurdity will follow, that if there happen to be an election one year according to the statute, and in another year on the prescriptive day, the former will continue in his office thirteen months and the latter only eleven months. The defendant *Nance* was not sworn in on the day of election, but at another court before *Pierce*, who presided at his election; now, though *Pierce* legally presided on the election day, yet no power is given him to call another court in order to swear him in. The third section relates to the swearing as well as the fourth, and says, where there is a contrivance in the lord of the leet in not holding a court, the swearing shall be by *mandamus* to the lord of the leet, &c. but where there has been no contrivance or default in the lord of the leet, to deprive him of his franchise and privilege of swearing would be a very hard construction. The mayor loses all his power by not going to an election on the prescriptive day; the presiding officer, who supplies his place, has only the same power as the mayor would have had on the prescriptive day. The mayor, it is plain, had not the power to swear in,

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against
NAMES.

why then shall the presiding officer on the statute day, who only supplies the place of the mayor, have a greater authority than the mayor had? The whole tenor of the act is to be taken together, and this construction answers all the purposes of it, and preserves the rights of all people who have been guilty of no default.

LEE, *Chief Justice*, delivered the opinion of the Court. The question is, Whether the defendant, who has been elected according to the statute, is bound by that part of the custom of this borough of being presented and sworn at the court leet? This question depends on the statute 11. Geo. 1. c. 4. The intention of the act, by the recital, is to institute a manner of election when there has been a failure on the charter or prescriptive day, left by that means the corporation should be dissolved. By the first clause of the statute the person presiding is to do every act belonging to the election, which the mayor might have done on the prescriptive or charter day. In the third clause it is observable, that the act takes notice where a nomination and election is necessary at the leet, and a provision is made for continuing the nomination; but there is no notice taken as to the swearing at the leet. The next clause is the fourth, which is a general clause, and has no saving or exception in it, but directs that the swearing shall be before the presiding officer. By these clauses it appears there is a manner and form of election and swearing prescribed by this act, and a continuance of the nomination where it is to be at the leet; and as the design of the act is to keep up the peace of corporations, it supplies the place of the mayor then in being, and has given an election on the next day, and provides for the swearing by one general direction, that if the election be at the leet, the swearing must be there also; but there is no direction to continue the swearing at the leet, where there is not an election on the charter day; and I take this to be the sense of the act, that where there is an election on the charter or prescriptive day, if there be any default of the lord of the leet in not holding a court, a *mandamus* may issue to oblige him to do it. It has also taken care to continue the nomination at the leet; but as to the swearing, the clause is so general, that I think in all instances of elections not on the prescriptive or charter day, the swearing must be before the presiding officer. Several objections have been made by the plaintiff, that the act says that the presiding officer shall have no more power than the mayor had; and if the mayor has no power to swear in, why shall the presiding officer? I agree, as to the election, that the presiding officer has no more power than the mayor had on the prescriptive day; but as to the swearing, it is expressly provided that it shall be before the presiding officer. It is also objected, that the lord of the leet being guilty of no default, the act could not intend to deprive him of his franchise. To this I answer, that the lord of the leet has the swearing, if there be an election according to the custom; but if not, it was a doubt before this act whether there could be any election at all, and therefore it is not to be wondered at if the parliament had no regard to such swearing, which is not preserved but on an election according to the

the custom; for I do not see how the jury could present a mayor at any other day, or by any other persons than are impowered to do it by the custom; therefore, as the custom of swearing at the leet is part of the custom of the borough, it must be confined to an election made in pursuance of the custom. It is also said, the defendant was not sworn on the day of his election but on another day, the twenty-second of *October*, whereas it should be at the time of his election. The day was put in answer to the day charged in the information, which is the twenty-second of *October*; but the day of swearing in this case is not material, if he is sworn before his admission, as appears by the case of *Vaughan v. Lewis, Carth.* 227. and here it appears that he was sworn before he entered upon the office. Upon the whole, the words of the act, as to the swearing upon the statute day, are mandatory, and *sic volo sic jubeo* is sufficient in the case of an act of parliament; but this is grounded on reason, and gives an operation to every clause of the act.

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against
NANCE

Therefore WE ARE ALL OF OPINION, that this swearing before the presiding officer is good; and that there must be judgment for the defendant.

Judgment was accordingly given for the defendant.

* * * * *

IT WAS NOW MOVED in arrest of judgment on behalf of THE CROWN, for that it appears by the defendant's own shewing, on the face of the record, that he has no right.

The presiding officer at the election of a mayor, pursuant to 11. Geo. 1. c. 4. may also be nominated at the same time as a candidate for the office; for though he cannot swear himself in, the Crown may appoint a person to perform that ceremony.

The objection to the defendant's right was, that there was no good nomination; for that *Pierce*, who was in *loco majoris* on the statute day, was not capable of being put in nomination with *Nance*; for he then acted as presiding officer, and he could not act also as a capital burges; and principally for this reason, that if *Nance* had been struck off, and *Pierce* and the standing man put in election, and *Pierce* had been chosen mayor by the free burgeses, he could not have been sworn in, for this Court has determined that the swearing must be before the presiding officer, and not at the leet; and as *Pierce* was himself the presiding officer, he could not swear himself in; therefore, for want of a good nomination, the defendant's election must be void.

LEE, Chief Justice, delivered the opinion of the Court. This is a motion in arrest of judgment on behalf of the Crown, that the defendant may be stayed from entering up his judgment, because it appears by his own showing, that he is not well elected for want of a good nomination. And if this appears to be the case, the motion will be very proper, notwithstanding the defendant has had a verdict for him, because it will then appear by his showing that he has no title: so is *Carthew*, 370. The custom is agreed on by both sides, that the major part of the capital burgeses are to nominate two of their own body, one of whom is to be struck off, and the other to be put in election with the standing man. The Crown objects to the nomination which has been made in this case, because *Pierce*, who is the co-nominee with the defendant, could

not

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not have been complete mayor if elected, for he could not have sworn in himself: and for another reason, that *Pierce* was incapable of both nominating and striking off himself. And though no objection be made to *Nance*, the defendant, or to *Pierce*, as being capital burgesses, yet it is said the nominees ought to be persons, either of whom, if elected, would have been capable of being the mayor. As to this, it is immaterial whether *Pierce* could have sworn himself or not, for if there be any means whereby the mayor may be sworn, that is sufficient; and if it appeared that there was no person in being who could swear him in, when elected, the Crown might authorize a person to perform that office; for if the swearing is not lodged in any particular person, it will be in the Crown; so that the objection, as to *Pierce*'s being incapable of swearing himself, will be easily answered.

A free burgess who acts at an election on the statute day in the place of the mayor, does not thereby lose his right to nominate a candidate.

THE SECOND OBJECTION is to this purpose, that *Pierce* acted on the statute day instead of the mayor, and as the mayor had no power to nominate on the prescriptive day, so *Pierce*, who is *in loco majoris*, cannot nominate on the statute day. This objection is grounded on a fallacy; for the reason why the mayor cannot nominate is, because the nomination is in the capital burgesses, and the mayor's power of acting as a capital burgess is suspended during the mayoralty; and yet it is true, that *Pierce* has the same authority as the mayor on the statute day. Here was a proper assembly of capital burgesses, and as such *Pierce* nominates, and this power he uses under the constitution; but as presiding officer he had another right, to strike off as well as to nominate, and this he does by virtue of the act of parliament; whereas he has the other by the constitution of the borough.

In what case acting as mayor and as capital burgess is not incompatible.

See *Milward v. Thacker*, 2 L. J. Rep. 81.

IT WAS THEN SAID, that these rights were incompatible. If they had proceeded to an election on the prescriptive day, these rights would have been exercised by different persons, whereas their being at this time exercised by the same person is owing to the default of the mayor, who absented himself; and it would be very hard if *Pierce* should be deprived of his right as a capital burgess, because the mayor was wilfully absent. And as to their being incompatible, the same person may exercise different powers in many cases; as in a writ of redisseisin the sheriff is both judge and officer; but there is no need here to go into this, because what *Pierce* has done was under the particular direction of an act of parliament, and occasioned by the wilful default of the mayor. The directions of the act are very plain, that the rights of every person shall be preserved on the statute day, and therefore *Pierce*'s right, as a capital burgess, is preserved to him; and then it enacts, as to the presiding officer, "that he shall have the same power as the mayor would have had on the charter or prescriptive day;" therefore if the mayor had been present, he would have presided and struck off one; and as *Pierce*'s presiding arose from the default of the mayor, it would be very hard to take away his right as a capital burgess; and to put any other construction on it would be to repeal a remedial law.

Here

Here a nomination and an election is found, and WE ARE ALL OF OPINION that the nomination is a good one, and that the defendant was well elected on the statute day.

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The rule for arresting judgment was discharged.

Bartlett against Gawler.

Case 319.

MOTION FOR A NEW TRIAL on the following case:

J. Colebrooke, seised in fee, mortgaged to *A. M. N.* for one thousand years; the plaintiff, *Bartlett*, recovered a judgment against *Colebrooke*, who afterwards, by lease and release, conveyed the inheritance by an absolute sale to *A. M. N.* The plaintiff brought a *scire facias* against the ter-tenants of these lands to shew cause why they should not be taken in execution on this judgment against *Colebrooke*. The defendant, *Gawler*, came in and pleaded the mortgage for one thousand years, which was assigned to him, and then prayed judgment, whether the plaintiff ought to have judgment against him except for the reversion. The plaintiff replied, that after the assignment of the mortgage to the defendant, *J. Colebrooke*, by lease and release of the premises, released the fee and inheritance to the defendant, whereby the term of one thousand years became merged in the inheritance. The defendant rejoined, that *J. Colebrooke* did not release in manner and form, &c.; and upon that issue was joined.

If, on proper notice, a party refuse to produce a deed necessary to prove the issue, the other party may give parol evidence of its contents.

1. Mod. 94.
5. Mod. 211.
386.
6. Mod. 225.
248.
10. Mod. 42.
74. 108.
Gilb. Law Evid.
4th edit. 96.
Bull. N. P. 223.
254.
Doug. 594.
3. Term Rep.
151.
Espinalffe Dig.
772.

To prove these releases, the plaintiff gave the defendant proper notices to produce them on the trial, and offered to prove that the deeds were in the defendant's custody, and likewise offered to prove them by one of the subscribing witnesses, who saw the execution of them; but the defendant, though called upon, refused to produce the release; and this evidence was disallowed by the Judge who tried the cause, as it was only parol evidence, and as the defendant was purchaser for a valuable consideration. Whereupon judgment was given for the defendant; and for this reason the plaintiff moved for a new trial.

The question was, As the defendant had refused to produce the deed, whether the plaintiff might give parol evidence of it?

The plaintiff's Counsel cited *Eggleton v. Speke* (a), *Wye-mark's Case* (b), and *Dr. Leyfield's Case* (c), that it falls within the rule of law, that the best evidence is to be given that the nature of the case will admit of, and as the defendant is proved to have the custody of the deed, the plaintiff can get no other evidence of it; if the plaintiff give a false account of it, the defendant may produce the deed and set it right.

(a) Carth. 20.

(b) 5. Co. 74.

(c) 10. Co. 93.

For

BARTLETT
against
GAWLER.

IT WAS ARGUED *for the defendant*, that this is calling upon a man to give evidence against himself, and would introduce perjury. And a difference was taken where a person has a right to a deed, and the other party gets the possession of it tortiously, there the other may give parol evidence of it; and cited 42. *Edw.* 3. c. 18. which is in 5. *Co.* 75. a.

LEE, *Chief Justice*. It is not material to determine what effect this release would have were it produced; the plaintiff says it would operate as a merger of the term, and let in the judgment creditor on the estate in fee. The issue was, Whether there was such a release or not? And the question is, Whether on this proof parol evidence of it ought to have been received? I think it falls within the general rule, that the best evidence is to be received which from the nature of the thing can be given. The reason for giving the other party notice to produce the deed before parol evidence can be given of it, is, that he may be apprized of your evidence, and be prepared to contradict you if you give a false evidence of it, by producing the deed in court, which will prevent the danger of perjury. The plaintiff has a supposed interest in it, and he thinks he shall be able to prove his issue by it, and he need not have such an interest as a party or privy has; and I think this evidence ought to have been received.

The OTHER JUDGES were of the same opinion.

WRIGHT, *Justice*, cited a case of *Pyne v. Lady Seymour*, *Easter Term*, in the ninth year of *Queen Anne*, before LORD PARKER.

Rule absolute for a new trial.

TRINITY

TRINITY TERM,

The Fourteenth of George the Second,

I N

The Common Pleas.

Sir John Willes, Knt. Chief Justice.

Sir Francis Page, Knt.

Sir John Fortescue Aland, Knt.

Sir William Fortescue, Knt.

} *Justices.*

Sir Dudley Ryder, Knt. Attorney General.

Sir John Strange, Knt. Solicitor General.

Johnston against Wilson.

Case 311.

WILLES, *Chief Justice*, delivered the opinion of the Court in this case as follows:

This was a motion in arrest of judgment after an interlocutory judgment by default, and a writ of enquiry of damages executed, in an action of covenant founded on a deed made the twenty-fourth of February 1737, not between the plaintiff and the defendant solely, but others were likewise parties to it; and recites the occasion of the deed to be a large common at *Seaton in Durham*, which the proprietors had a mind to inclose and improve, and that partition should be made as arbitrators should think proper, and that the sea bank should be kept up as they should direct. They first covenant mutually for their own acts only with each other, and not for the acts of any other, and therefore they are as several and distinct as the law will allow and the nature of the thing permit; and afterwards they go to particular covenants, that they will direct five arbitrators, and that the award is to be made the first of *October 1738*; and then comes this clause, that they would agree to all reasonable things agreed on by the arbitrators towards ascertaining the divisions and setting out the respective portions of each, and that the arbitrators may make such partition as they in their judgment thought fit, and direct such deeds as are necessary to compleat such partition (this is part of the covenants); and when the partition is made, they are to

If several persons, being seized in common, enter into an arbitration bond, for the purpose of partition being made among them, and the arbitrators allot several parts to several persons to be held by them in severalty, but do not direct any deeds to be executed to carry the partition into effect, and to vest the respective shares of the lands in the several persons to whom they were allotted, THE AWARD is bad, for want of a

compleat partition being made. — S. C. 16. Viner, 221. *notis.*
hold

JOHNSTON
against
WILSON.

hold in severalty; and they covenant that the sea bank should be kept up as the arbitrators think fit, and that the owners of the lands shall pay what the arbitrators think reasonable, and the proportion for surveying the land and establishing the award, into the hands of *Johnston* and two others, and bind themselves for performance in three hundred pounds. The award was made within the time, viz. in *September*, and by the award they have made partition of the greatest part, and the rest, which was undivided by the arbitrators, was to be held in common; and they allotted to *Wilson*, *Whitehead*, and *Doe*, twenty-two acres in lieu of their estate in the common, and that they should maintain fences, &c. which divided them from the rest. Then they award as to the sea bank that it should be kept up as before, except that now they should contribute towards it according to their allotted shares, except *Knakenby*, who is now to pay nothing, the sea not reaching his land; and then they award thirteen acres to *Johnston*, and that he repairs, &c. as before; and then they award that they shall pay their proportion for establishing the award.

The plaintiff avers, not that he has performed the covenants, but that he has performed his part of the award, and then assigns these breaches: FIRST, That the defendant has not made his fences; SECONDLY, That he has not paid his proportion of the money for the repair of the sea bank; and these two he has laid as contrary to the award, and not as breaches of the covenants; and, THIRDLY, That he did not pay his share of the expence of the award and surveying, and this is laid as being against the covenant; and though the first two breaches which are laid against the award may not be good, yet the third may stand; and on the first two breaches the plaintiff cannot have judgment.

The objections to it are two: FIRST, That the award is void; and, SECONDLY, If there be any collateral breaches assigned on which this action may be brought, yet all the parties should have joined in the action.

TO THE FIRST, If the award be void, all covenants which are dependant on the award are so too; if the deed which contains the covenants be void, the bond to perform those covenants will be void also, for the foundation of all fails, and then every thing built on it must fall; but if they be independent collateral covenants, they may stand though the award falls (a). The principal reason why this is void is, that all things to be done are relative to the first partition; and if no partition be made, all dependant on it must drop; and here the arbitrators have not made a good partition, because they have assigned no deeds of division nor proper assurances. On the other side they cited cases to shew how partition might be made without deed, and for that reason that this was a compleat division, *Litt. f. 244.*; but this is not a sufficient proof, for *Littleton* says only between parceners, which will not hold with respect to tenants in common and joint-tenants,

(a) 1. Sid. 309. 1. Lev. 45.

JOHNSTON
against
WILSON.

and so *Coke*, 1. *Inst.* 169. explains it, for he says "a partition by a parol between tenants in common, if executed by livery, is good." These are plainly tenants in common, and this award is not good without deeds executed; and as before the statute of Frauds a feoffment was not good without livery, the same reason will hold still; so now no confirmation though by livery, if without deed, is good; here proper conveyances should be executed, and as they have directed none, the award is incomplete and void. There was another answer attempted to be given, *viz.* that the award may be good in part and bad in part; but to that I answer, It is true it may be so; but **FIRST**, This matter is the whole thing submitted; and, **SECONDLY**, The first two breaches depend on this part of the award: and if the award be bad, there can be no judgment for the first two breaches; for if the several parts be not well allotted, the plaintiff can have no better title than he had before the award; and the second breach seems as little supported, though at first I thought otherwise: It is for not paying his proportion for repairs pursuant to the award, because one is exempted from paying a proportion, which must be if the partition stand, but since it does not that falls also. But the third breach is on another foot; it is for a breach of the covenant which is collateral to the award; it is a covenant to pay a proportion of the previous charges of making the award, and whether the award is good or not he is bound to pay his equal share; and so these covenants to do that particular bring us back to the cases cited, which prove, that though the dependant covenants be void, yet a collateral one will stand; and this we think a collateral covenant. We should think this would have been sufficient, if there were no other objection but to the award; but there is another objection, which, if good, will go to this point, *viz.* that it is a joint covenant because they have joint interest; for the covenant cannot alter the nature of the estate, and then they should join in the action, as 5. *Co.* 186. *Skin.* 401. *Camb.* 315. 1. *Saund.* 153. But I answer, that this objection depends on their having a joint interest; but here they have several interests and are tenants in common, and then they may covenant severally, which puts an end to the objection: and it is not like the case in *Carth.* 97. where it is said that damages may twice be recovered, for the jury can give no damages but what this particular man has sustained, so that there is no sufficient reason to arrest judgment. When I was before ready to give judgment I conceived two doubts: **FIRST**, That the plaintiff has not shewn that he has sustained any damages; and **SECONDLY**, That he has not averred that he has performed his covenants. But for the first, the jury on the inquest have found that he did suffer damages, and so it must be taken for granted; and the defendant has admitted it by letting judgment pass by default. And to the second the distinction is, that where there are mutual covenants not depending on each other, the plaintiff, in an action of covenant, need not aver that he has performed his part. But where the mutual covenants have a de-

pendance

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dance on each other, as where one is a consideration for the other, there you must aver performance on your part, as 1. *Lutw.* 249. So that the first two breaches must be released, and judgment taken out for the last.

Case 312.

Carver against James.

If to an action as executor, on promises made to the testator, the defendant plead *non assumpsit* and the statute of Limitations; A REPLICATION that the testator sued on a writ of privilege, and that the cause of action arose within six years before the writ purchased, is bad.

THE PLAINTIFF brought an action on the case, as executor of *B. Carver*, on many promises made to the testator in his lifetime. The defendant pleaded two pleas: FIRST, *Non assumpsit*; and SECONDLY, That the cause of action did not arise within six years. The plaintiff replied very particularly, *viz.* that the testator sued a writ of privilege (it is not laid to be delivered to the sheriff, but that the sheriff did not return it), and continued it until the testator's death by proper continuances; he died the twenty-eighth of June 1737; and that afterwards, in Trinity Term, in the eleventh and twelfth year of *George the Second*, he sued a *capias* against the defendant, which was within a year after the testator's death; and the defendant appeared; and the plaintiff declares against him, and then says the cause of action arose within six years before the first writ of privilege purchased. On this the defendant demurred for want of sufficient return to the writ; and though only one cause of demurrer was assigned, there were four taken:

FIRST, That the writ of privilege was bad, because not returnable on a day certain; and if this be bad, all the continuances will be void.

SECONDLY, The writ was never returned; and then also all the continuances built on it must fail.

THIRDLY, A writ taken out within a year after the testator's death is not good and well set out; for an original should be set forth, and not a *capias* only.

FOURTHLY, That it should be taken out as executor to *B. Carver*.

WILLES, Chief Justice, delivered the opinion of the Court.—I chuse to begin with THE THIRD and FOURTH OBJECTIONS, because though we all agree that the replication is bad, yet we differ in our reasons; and in these two objections WE ALL AGREE, that they are of no force: for first a *capias* is sufficient without an original, being the course not to take out an original unless the party be drove to it, as the *latitat* in the king's bench is sufficient to take a cause out of the statute without a *Bill of Middlesex* (a); and we are justified in this by some adjudged cases: In the case of *Halister v. Woolstons* (b), from a faithful reporter, it is held, that a *latitat* is not the first process, but pre-supposes a *Bill of Mid-*

(a) Carth. 233. 1. Sid. 53.

(b) Easter Term, 9. Geo. 2.

dlsex;

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against
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dissex; and in *Deathbridge's Case* (a) it was adjudged, that a *capias* was sufficient without setting out the original; and to keep pace with the court of king's bench we judge it to be sufficient here, the reason in both courts being the same; and we all agree that this *capias* is sufficient.

We also agree in THE FOURTH, that it is plain it was taken out as executor.

In the other two there is a small variety, for we all think judgment should be for the defendant, because the foundation fails, viz. that the writ of privilege is not sufficient, nor the continuances, because the return ought to be on a certain day; but whether it be void, or voidable only, we are not agreed. But, SECONDLY, As to the question, Whether it ought to be returned? the case in *Lutw.* 256. is, that it is sufficient without a return; but there is a distinction there which is not in this case, for there it does not appear whether or no there was a return, for they said they would intend it was returned; which intendment cannot be here, for it is expressly alledged *vicecomes non misit breve*. And in another case in *Lutw.* 260. it is said, that case appeared by a manuscript of *Lawley's* to have been reversed in parliament in 1702, and that it should be set forth that it was returned. And in *Lutw.* 280. in the case of *Green v. Revils* (b), the same point is adjudged; and all these cases seem to be founded on *Spencer's Case* (c), the reasons of which case seem to be the measure of the judgment in the king's bench in the case of *Kinsley v. Hayward* (d); and after so solemn an adjudication we should conform our opinions to such adjudications. For my part, I should be of opinion that the writ should be returned, as a foundation to support the continuances, which would give the parties notice. We all think the first process not sufficient to support the subsequent continuances; but if the first process be right, you may continue it down during the whole six years by *vicecomes non misit breve*.

(a) *Michelm's Term*, 3. Geo. 2.(d) 1. *Lut.* 256. *New Lutw.* 30.(b) *Salk.* 421. *S. C. ante*, 12.3. *Ld. Ray.* 432. *Ray. Ent.* 322.(c) 6. *Co.* 20.

Bradford against Brien.

Case 313.

THE PLAINTIFF brought an action of debt on an arbitration bond, bearing date the thirtieth of July 1739, and, on oyer, the condition appeared to be, "to abide by the award of E. E. in all actions, suits, controversies and demands, so as the said award be made and ready to be delivered to the parties before the eighth of August following."

The defendant pleaded, that no award was made.

The plaintiff replied, that there was an award made and ready to be delivered before the eighth of August following, and sets forth

An award which excepts part of a matter in dispute, and leaves the party to prosecute his right therein at law, is bad.

6. *Mod.* 232.

Godb. 276.

1. *Bar. K. B.* 463.2. *Ld. Ray.* 961.

140. to 146.

2. *Str.* 1024.1. *Burr.* 274. and *Kyd on Awards*,

BRADFORD
BISHOP

the award; and that the arbitrators awarded, "that all actions, suits, controversies, &c. before the thirtieth of July 1739, should cease for ever; and that before the October following the defendant should pay to the plaintiff fourteen pounds sixteen shillings and sixpence; and that the sixteen shillings and sixpence should be in full for all tithes; and that the parties should, by deed, release to each other all demands, &c." and lays the breach in non-payment of the fourteen pounds sixteen shillings and sixpence.

The defendant rejoined, that in the award there is an exception of all tithe calves, and that the plaintiff should be at liberty to prosecute his right to tithe calves at law, if he had any right thereto.

The plaintiff, stating by profection that tithe calves were not excepted, demurred. The defendant joined in demurrer.

WILLES, Chief Justice, delivered the opinion of three of the Judges, viz. his own opinion, and the opinions of PARKER, Justice, and WILLIAM FORTESCUE, Justice; FORTESCUE ALAND, Justice, doubting and being absent.—There is but one question in this case, which is, Whether the award be good or not? And there is but one objection to it, viz. that "all matters in dispute" are submitted, and yet all matters in dispute are not determined, the tithe of calves being excepted. The rule, as it is laid down in the Books, is, that when the submission is conditional, namely, with an *ita quod* an award be made of the premises, the award must be final as to all matters within the submission, of which the arbitrators have notice, and that it cannot be good in part and bad in part (a). So that it is now settled, that the conditional words will make the award void, if it do not extend to, and is final in, all matters within the submission; and in the present case the arbitrators take notice of a difference subsisting between them for tithe of calves. The words in the submission in this case are, "so as the said award," and does not say "of the premises; but the words in *Cro. Eliz.* are "the same award," which, in my opinion, does not differ from this; but the case in *Lutwych* has the same words which are used here, and is an authority in point. For my own part, I would carry this matter as far as any court has gone before me; and if it were a new case, though there were not words of condition in the submission, I should incline to make an award which was not final in all the things submitted, intirely void; for the parties otherwise have not the benefit they proposed by the award. This, no doubt, is a conditional award, and for that reason is intirely void. But as my Brother FORTESCUE ALAND is not here, and has some doubts in this case, it will be proper to inform you of them. What he went upon was, that it was a final award at the beginning, and therefore the exception which followed was void, and for his opinion he quoted 6. Mod. 34. Salk. 74; but that case differs in two respects

(a) Cro. Eliz. 839. Cro. Jac. 200. 355. 1. Lutw. 550.

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against
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from this : FIRST, This award does not direct that this suit shall cease, but that the plaintiff shall be at liberty to prosecute his right to the tithe calves at law ; but the award in that case says, that " all suits between the parties shall cease : " And, SECONDLY, In that case the words are " suits now depending, " which are not in the present case. One thing which stuck a little with me was, that the plaintiff agreed that he should be at liberty to sue at law for the tithe calves, and that the defendant agreed to it too, which may seem to take it out of the award, for *Consensus tollit errorem*. But two questions arise, which answer that doubt : FIRST, Whether such an agreement can be admitted ? and, SECONDLY, Whether such an agreement be sufficient to alter the first submission ? It is a rule, that all matters of fact well pleaded are allowed by the demurrer, and though the plaintiff endeavour by his *protestation* not to be concluded, it signifies nothing ; but the defendant confesses only there was such an award, in which the arbitrators say so and so, but not that what they say was true. And, SECONDLY, The first submission was under hand and seal, but this agreement was not, and therefore cannot defeat the first submission. On the whole, if the award is void, the defendant is in the right to say there is no award ; and therefore judgment must be for him.

MICHAELMAS TERM,

The Fourteenth of George the Second,

IN

The Common Pleas.

Sir John Willes, *Knt. Chief Justice.*Sir Parker, *Knt.*Sir John Fortescue Aland, *Knt.* } *Justices.*Sir William Fortescue, *Knt.*Sir Dudley Ryder, *Knt. Attorney General.*Sir John Strange, *Knt. Solicitor General.*

Peachy against Osbaldiston.

Case 314.

ON AN ACTION on a promissory note against the defendant as indorser to the plaintiff, the following case was made at the affizes:—The note was drawn in *October 1735*, by one *F. S.* payable in *January* following, for two hundred pounds. In *October* the defendant agreed with the plaintiff that he should discount the note, for which he paid the sum of four guineas. Afterwards, on the twenty-eighth of *January*, when the note became payable, the defendant offered the plaintiff eight guineas for the forbearance of the payment for six months, but the plaintiff insisted on ten guineas, which the defendant was obliged to pay. It was proved at the trial that ten pounds *per cent.* was the usual discount of notes to goldsmiths and others in the City. It was also proved, that in order to smother the appearance of usury, the defendant gave the plaintiff a fresh promissory note dated on the twenty-fifth *January* payable in six months, that it might not be said to be so much money advanced on one note.

It is usury to take more than legal interest by way of discount.

3. *Keb.* 259.
1. *Vent.* 253.
Cro. Car. 283.
4. *Leon.* 43.
2. *Lechin.* 38.
Salk. 344.
2. *Stra.* 1249.
and see 2 *Hawk.*
P. C. c. 82.
where all the cases on this subject are collected.

The question in this case was, Whether this is an usurious contract or agreement, within the 12. *Ann. c.* 16. so as to make the note void?

A 2 3

The

PEACHT
against
OSWALDISTON.

The words of the statute are, "That if any person take, either directly or indirectly, more than the sum of five pounds for the forbearance of payment of one hundred pounds for the space of one year, and so in proportion for any less or greater time, such contract, agreement, &c. shall be absolutely void."

WILLES, Chief Justice. This is plainly within the words of the act in two particulars, though in the first place they have endeavoured to evade it by drawing a fresh note, yet the words "directly or indirectly" clearly comprehend it; and in the next place, it being for forbearance of payment, it is expressly within the words of it. There is no occasion at present to take into consideration the matter of discount; but it would be very extraordinary if it should not come within the statute, and by that means the force of the act would be intirely taken away; for a usurer has nothing to do but get a fictitious note drawn and indorsed, upon which he may discount what sum he pleases at an exorbitant interest.

The rest of the Judges were of the same opinion.

Judgment was given for the defendant.

Case 314

It is stated in the report that the defendant was a promisor of a note for the sum of one hundred pounds, payable in January following for two hundred pounds. The note was drawn in October 1732 by the plaintiff, and was payable in January following for two hundred pounds. The defendant agreed with the plaintiff that he should discount the note, for which he paid the sum of four guineas. Afterwards, on the twenty-eighth of January, when the note became payable, the defendant offered the plaintiff eight guineas for the forbearance of the payment for six months, but the plaintiff insisted on ten guineas, which the defendant was obliged to pay. It was proved at the trial that ten pounds ten shillings and six pence was the sum of money advanced on the discount of the note, and that the defendant had offered to pay the plaintiff eight guineas for the forbearance of the payment for six months, but the plaintiff insisted on ten guineas, which the defendant was obliged to pay. The plaintiff gave the defendant a fresh promissory note dated on the twenty-eighth of January payable in six months, and it might not be that he had much money advanced on the note.

The question in this case was, Whether this is an evasion of the statute, with the 12. Geo. 2. c. 19. so as to make the contract void.

MICHAELMAS

MICHAELMAS TERM,

The Fourteenth of George the Second,

IN

The King's Bench.

*Sir William Lee, Knt. Chief Justice.**Sir Francis Page, Knt.**Sir Edmund Probyn, Knt.**Sir William Chapple, Knt.**Sir Dudley Ryder, Knt. Attorney General.**Sir John Strange, Knt. Solicitor General.*} *Justices.*

The King against Dr. Bland, Provost of Eton.

Case 315.

ON RULE to shew cause why a *mandamus* should not issue to Dr. Bland, provost of Eton College, to affix the college-seal to the presentation of one *Parsons* to a college-living, being nominated thereto by a majority of the fellows; the provost and one fellow being for another person, the provost insisted, that he had a negative upon the fellows, and therefore without his consent a majority of the fellows could not nominate any one.

A *mandamus* lies to the provost of a college to compel him to affix the college-seal to a presentation by the College.

But the principal question now was, Whether a *mandamus* could be properly issued in this case?

THE SOLICITOR-GENERAL insisted, that this was an improper matter for a *mandamus*. This is of the same nature as a private advowson, and has the same rules and laws to govern it, and to which a *mandamus* was never granted. If the provost, &c. do not agree and present some person within the time limited by law, it will lapse to the bishop, which will prevent any inconvenience to the parish being without a parson for that time any more than in the common case. In the case of *Clarke*, in *Michaelmas Term*, in the twelfth year of *George the Second*, where a *mandamus* was to elect him a prebendary, he had a freehold in the office, and the act to be done to complete it was only a ministerial act, viz. instalment: But here is as yet no right in the plaintiff.

THE KING
against
DR. BLAND,
PROVOST OF
ETON.

HOLLINGS contra. This is a proper matter for a *mandamus*, it being to oblige a provost to execute a trust. A *mandamus* has issued in the case of a sexton (a), a parish-clerk (b), and a school-master (c). A *mandamus* has been granted to admit a deputy register (d). Here the act of putting the seal is ministerial, and to complete a particular act already done in part, and is not to elect a person into the living, but to present one already nominated (e). It is a matter proper for examination, and there ought to be a return made to it, when it will come on fully (f). Besides, the plaintiff has no other way of proceeding to remedy himself, for the visitor has nothing to do with him, he not being anyway concerned in the college.

LEE, Chief Justice. Here has been at least the appearance of an election; and there are many questions that will arise upon the statutes of the college, and also upon the statute 33. Hen. 8. Whether that takes away a negative in all cases? and therefore there is a very good reason for the Court's interposing and granting the *mandamus*. In the case of *St. John's College* (g) it was said by **HOLT**, that if there is a visitor, the Court will not interpose in a case where the local statutes of the College are only in dispute. But when the public laws of the kingdom are disobeyed, they will always take notice of it, and grant the *mandamus*. *Dr. Bland* will have the same benefit and advantage in controverting this matter upon the return of this writ, as he has now. I do not see any difference between this and the *Bishop of Salisbury's Case* (h), where the Court said, that if any right was shewn they would grant the *mandamus*, and have a return made, without determining the matter of right whether a peremptory *mandamus* will lie or not; which I shall not do now. But I think a *mandamus* ought to go.

PAGE, Justice, was of the same opinion.

CHAPPEL, Justice. It does not appear to me, that if the Court should deny this *mandamus*, the plaintiff has any remedy at all.

A *mandamus* was accordingly granted to *Dr. Bland* (i).

(a) Raym. 211. 1. Vent. 143. 153.

2. Lev. 18. March, 101.

(b) 2. Roll. Abr. 234.

(c) Ray. 12. 1. Sid. 40. Stra. 58.

(d) Rex v. Dr. Ward, Michaelmas Term, 4. Geo. 2.

(e) See Cowper, 377.

(f) *Mandamus* to restore *Dr. Bentley*, Hilary Term, 9. Geo. 2. 2. Stra. 972. Bishop of Litchfield, Michaelmas Term, 7. Geo. 2. 2. Stra. 1023.—*Vincent*, Bishop of London.—To elect a Lecturer of *St. Dunstan's*, Michaelmas Term, 4. Ann. Oakquib.—Trinity Term, 13. & 14. Geo. 2. The King v. Dr. Whaley, *mandamus* to admit one fellow of a college, 2. Stra. 1139.

(g) Rex v. St. John's College, Cambridge, 4. Mod. 241.

(h) See Rex v. Baker, 3. Burr. 1265, and 1. Black. Rep. 352, 552. Cowp. 378.

(i) See Rex v. Vice-Chancellor of Cambridge, where a *mandamus* was issued to the keepers of the common seal of the University, commanding them to put it to the appointment of high steward, 3. Burr. Rep. 1647.—See also Rex v. Dr. Windham, where a *mandamus* was granted to compel the warden of Wadham College to affix the common seal of the College to an answer of the fellows, &c. in chancery, contrary to his own separate answer put in. Cowp. 377.

Marlow

Marlow against Forbes.

Case 316.

BY the 5. Geo. 2. c. 30. bankrupts are to be examined in forty-two days after the commission issues, or in such further time as shall, on petition, be allowed him by the chancellor; during which time the person of such bankrupt is to be free from arrests. There is also another clause which obliges the bankrupt to attend the assignees after that time, upon notice in writing. But it is not then said that his person shall be free from any arrest.

A bankrupt voluntarily attending the commissioners on the parol request of the assignees, after the forty-two days are expired, is not protected from arrest.

The defendant had a commission issued against him, and had given his proper attendances within the time allowed by the act and by the chancellor pursuant to the act. He was afterwards ordered by one of the assignees to attend again for further examination, but not by any notice in writing; which he accordingly did, and on such attendance was arrested on a promissory note given to the plaintiff's father, who was an assignee, and by him indorsed to his son the plaintiff.

Lex Mer. 538.
1. Atk. 238.
Cowp. 157.
Cooke's B. L.
142, 143.

The defendant had never obtained any certificate from his creditors; and it was proved, that the note was indorsed before the commission issued.

On motion to discharge the defendant from prison, on his filing a common appearance,

The question was, Whether a bankrupt thus attending the assignees after the forty-two days and the advanced time allowed by the chancellor, and without having a notice in writing, so that strictly he was not obliged to attend, could be legally arrested?

LEE, Chief Justice. I do not see how this defendant can be discharged. There are three clauses in the act relating to his attendance: **FIRST**, He is to attend within forty-two days: **SECONDLY**, or within such time as the chancellor shall allow him further: and **THIRDLY**, That after this he shall attend the assignees for further examination upon notice in writing being given him. Now in the two first cases it is particularly ordered, that during such attendance his person shall be free from arrests; but in the other clause there is no such thing said. Besides, by the latter clause he has no need to attend unless he has a notice given him in writing, which the defendant had not; and if he will voluntarily attend without any compulsion, if he is arrested it is his own fault, and he cannot now be discharged.

PAGE, Justice, of the same opinion.

CHAPPLE, Justice. I think there is no reason to extend this act to the prejudice of the creditor any further than the strict words will carry it; and therefore I am of the same opinion.

The rule was discharged.

Vernon

Case 317.

Vernon and Others against Jefferies.

In covenant, if there are several parties named in the deed, but it is only "signed, sealed, and delivered" by some of them, those who did not execute it must be excluded as parties by proper averments in the declaration.

S. C. & Stra.
2246.

5 Com. Dig.
"Pleader"

(a. V. a.).

ACTION ON ARTICLES OF AGREEMENT made between several persons, who are separately made parties to the deed, for breach of covenants made for carrying on a salt trade among themselves.

The defendant demanded *oyer* of the articles, by which it appeared, that they were made between nine several parties, and that the covenants were mutual to all the parties named in the deed; but that the plaintiffs only sealed and delivered the deed, and that the others, who were not parties to the action, were covenantees in the deed, but did not execute it. And for this variance between the articles and declaration the defendant demurred, and shewed for cause of demurrer, that it now appeared upon record that there were other parties to the deed who were equally covenantees with the plaintiffs, but were not parties to the action, as they ought to have been. The plaintiffs joined in demurrer.

The question was, Whether those covenantees who did not sign nor seal the deed ought to be made plaintiffs in the action?

This case was argued twice: first by *Serjeant BOOTLE* for the defendant, and *Counsellor BOOTLE* for the plaintiff, in Trinity Term 1740; and in this Term by *DENNISON* for the plaintiff and *FORD* for the defendant.

IT WAS ARGUED for the defendant, that this being an indenture *inter partes*, and all the covenantees being particularly made parties to it by name, is sufficient to shew that they were parties to it, without their signing and sealing it, and therefore ought to be made plaintiffs. That by this deed a joint interest is vested in all the parties to the deed, as being covenantees equally with the plaintiffs, and therefore ought to join with them in the action; for else the defendant may be sued several times for the same thing. It was held on demurrer, that where two were covenantees in a charter-party, though one only signed and sealed it, yet the other, who did not, might sue upon it with the plaintiff who did execute it. That it is an estoppel to all the parties, as well those who did not execute it as those who did, to aver against what appears upon the face of the deed. If one of the parties had released to the defendant, it would have barred the rest, being made *inter partes* (a). And if the plaintiff had recovered a judgment against the defendant, it could not have been pleaded in bar to any subsequent action brought by any other of the parties on this deed. If there be two obligees in a bond, and one only sue, he must shew that the other is dead, otherwise it is bad. The want of parties in an action on a bond was pleaded in abatement, and it was held for the plaintiff, being brought by the survivor; though it was not averred that the other was dead; but it was said, that if *oyer* had been demanded of the bond, and a demurrer to it, it would

(a) See 2. Inst. 673. and 1. Cro. 56.

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be otherwise. In another case, a covenant or agreement was entered into by several hiddlers about the performance of their parts, and on an action brought by one of them for a breach of the covenants, it was held bad for want of parties; for they all should have joined in the action. And this deed is now set out upon the *oyer* being demanded of it. It is the same as if made part of the declaration, and is become part of the record; and therefore, as it appears upon the face of it, there wants necessary parties.

IT WAS ARGUED *for the plaintiff* thus: The question is, Whether there is here a variance between the deed set out in the plaintiff's declaration and that set out upon the *oyer* given of it by the plaintiff? The several persons who are made parties to the deed, and are not plaintiffs in this action, appear never to have executed the deed, and therefore have no interest in it, and consequently are not to be parties to the action. There is a great difference between articles of coparcenership and a deed of feoffment or grant; for in the latter it is good, though the grantee did not execute it, and an interest passes from the grantor without any act done by the grantee, only by the acceptance of the deed; but in the case of articles of coparcenership they have no operation, unless all the parties execute it. If ten men become partners, and all their names are inserted in the deed, and mutual covenants, but five only execute the deed, it is a coparcenership between five only, and has no effect as to the rest. *Cartwright* and *Another* being joint-tenants demised the premises, reserving twenty pounds rent to them both; *Cartwright* alone sealed and delivered the deed, and brought debt for a moiety of the rent, and a reservation of ten pounds rent to him; and the Court held, that the declaration was good for a moiety only; for there being an exception of the other's sealing, which never was done, the deed as to one moiety of the land and the rent reserved had no effect; and the defendant is to shew that they all executed the deed. There is a great difference between a deed made *inter partes* and one that is not so: for in the first case, no one can bring an action upon it, or release by virtue of it, who are not parties to it, and are made so in the beginning, and expressed so to be: but in the case of a deed-poll it is otherwise; for that is not between parties, but is generally in the first person: and on that a person may sue who did not execute it, and who was not a party. The question then will be, as this is made *inter partes*, Who are properly the parties to it and have an interest in it? And as this is in nature of a coparcenership, no one is a party to it but those who executed it, for until then nothing passes from him, nor is he bound by it. The nearest case which comes up to the defendant's purpose is that in 2. Roll. Abr. 22. where in an indenture *inter partes*, and several covenantees, one who did not sign or seal the deed was allowed to sue upon it; but this was upon an indenture of grant to another, and an interest passed without his sealing the deed, which does not in our case, for nothing is conveyed to one or the other, only an undertaking with such who executed the deed. Besides, *Cartwright's Case* is directly contrary to it, and is subsequent to it.

As

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against
JEFFERIES.

As to what has been said, that it being set out upon *oyer* it will become part of the record, and inrolled with the rest, and so the variance will appear upon the face of it, that has nothing to do with the present question; because if they who did not seal it are not properly parties to it, it being mentioned to be made between them and others will not infer that they did seal it. Therefore this action could not be brought in any other manner than it is; for if it had, the defendant might have taken advantage of it by pleading that they were no parties to the deed; and therefore the plaintiff is entitled to the judgment of the Court.

In *Trinity Term*, on the first argument, the Court said,

LEE, *Chief Justice*. Though these parties who did not sign the deed, are not liable to be sued upon it, nor are bound by the deed, not having executed it, yet it will be a question whether they ought not all to be made plaintiffs in this action, as the covenants are made to them as well as to the plaintiffs. And if they ought to have been joined, I think it may be taken advantage of on this demurrer; for by the *oyer* given of the deed there appears upon the face of it to want parties to the action.

PROBYN, *Justice*. Where the defendant takes advantage of anything that does not lie in the plaintiff's knowledge, as misnomer, &c. it must be done by plea in abatement, and the defendant must shew the plaintiff how he may have a better writ. But where it is of what is in the plaintiff's own knowledge, and what he has not set out, it is proper to take advantage of it on demurrer.

CHAPPLE, *Justice*. No one can be bound as a partner without executing the deed.

Afterwards, in this Term, the Court gave judgment.

LEE, *Chief Justice*. I take the distinction of this case to be, that where there are two covenantors, and one only is sued, that it is bad, and the defendant must plead it in abatement; and where there are several covenantees, and all are not joined in the action, the defendant need not plead it, but may demur to it if he please: so is 1. *Vent.* 34. 1. *Sid.* 420. Covenant was made to two, and *qualibet eorum*, and one covenantee alone brought an action of covenant; and it was said, that this was sufficient, for it did not appear that the other was injured; and if not, he had no occasion to join in an action: but the Court held, that one covenantee alone could not bring the action, but that all must join, for else the defendant might be troubled several times for the same thing, and that this might be taken advantage of either by pleading or on demurrer. Now as to this case it is said, that they are only nominal parties, and need not join, and that it must be taken, as it is now set out, that they did not all seal it. But this I very much doubt of, for here the action is brought by those only who did seal it; and upon the *oyer* of it there appears to be others who are parties, and who must be taken to have sealed it; and if they should not

not all be obliged to join, it might occasion great multiplicity of actions. It seems to be settled, that all the covenantees must join in the action. When, therefore, it appears on the face of the proceedings that there are other covenantees in the deed, and it does not appear but that they all executed it, for they are all made parties, I think it will be incumbent on the plaintiffs to shew why the others are not joined. In 2. *Inst.* 673. it is said, that *prima facie* all that are mentioned as parties in the deed shall be considered as proper parties, and to have executed it, unless the contrary appears. There has no answer been given to the case in 2. *Roll. Abrid.* 22. or to that in 2. *Levinz.* 74. where it is said, all the covenantees must bring the action, though they did not all seal the deed; and that judgment ought to be given for the defendant.

The rest accorded; and that supposing the other covenantees did not really seal the deed, yet they all ought to be made parties.

Judgment for the defendant.

Ellison against Comyns.

Case 318.

ACTION ON BOND for the performance of an award. The submission is, "of all matters in dispute, and of all actions whatsoever depending between the parties." The arbitrators awarded the defendant "to pay thirty-seven pounds to the plaintiff in satisfaction of all actions, &c. as well of those which were depending between them in their own right as of those which were brought as executor, &c." It appeared, that there were disputes between them in both rights, in their own and as executor; but in the submission it is not mentioned between them as executor, &c. only in very general words, "of all actions, &c."

The defendant demanded *oyer* of the award, and demurred for these causes.

FIRST, That it is not set out to be under the seal of the arbitrators, which ought to have been. An award cannot be made by deed, unless it be in writing; and if so, it must be under seal also; for every deed must be sealed, otherwise it is but a parol agreement or award.

SECONDLY, That it is not duly set out; for that part which says the award shall be made a rule of court, is not taken notice of in the declaration; so there is a variance between the declaration and the award set out upon *oyer*: and *Salk.* 72. was cited, where it was held, that if a man declare upon a deed, he need only set forth so much as will make for him; but where he declares on a bond for performance of an award, and sets out the award only as a collateral matter, he must set out the whole; and if the omissions are a material part of the award, it will be fatal to the plaintiff.

THIRDLY, That it was not said in the declaration that the defendant had notice of the award's being made.

FOURTHLY,

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Declaration on an arbitration-bond is good, **FIRST**, although it do not appear that the award was under the seal of the arbitrators; **SECONDLY**, although the clause to make the submission a rule of court is not set out; **AND**, **THIRDLY**, although it is not said that the defendant had notice of the award.

Under an arbitration-bond submitting "all matters in dispute, and all actions whatsoever, &c." to the decision of the arbitrators, an award that one of the parties shall pay 37*l.* to the other in satisfaction of all actions depending, whether in their own right or as executor, is good.

FOURTHLY (which was the principal objection), that the arbitrators had exceeded their authority, having awarded a matter between them as executor, which was not mentioned in the submission, only in the general words "all actions and disputes, &c." which did not include it. On a submission "of all actions, &c." a debt due to the plaintiff in right of his wife cannot be awarded (*a*). An executor cannot maintain an action in his own right and as executor both in the same suit (*b*); nor can he be charged in both rights at once: so here, under these general words, a matter in both the rights cannot be determined, they being of two different natures. A submission was generally, "of all controversies, &c.;" and it was held, that the award was bad, because the arbitrators had exceeded their commission (*c*). A release "of all actions, rights, &c." will not include an action or right, &c. due as executor, nor a demand which is future, and not intended to be released (*d*). So a grant of "*omnia bona sua*" will not pass goods which the grantor had as executor, unless he had no other goods (*e*). The plaintiff should have averred in the declaration, that all matters in dispute between them were submitted, as well those which were depending as executor as those in their own right, and that there was no other dispute between them but as executor; and then those general words might have helped him, as it would in the case of release "of all actions, &c.;" but without such averment it is bad. An award may be good in part and bad as to part; but here they have awarded this as one entire sum, and therefore must be bad for the whole.

IT WAS ARGUED *for the plaintiff*,

AS TO THE FIRST OBJECTION, It need not be said to be under the seal of the arbitrators, for the condition of the bond is only "so as an award be made in writing, &c.;" and nothing is said of its being under their seal: which will likewise answer the third objection as to the notice; for the plaintiff is not bound to give him notice of it; and the defendant must know of the award being made as well as the plaintiff.

AS TO THE SECOND OBJECTION, That the award is not duly set out, the only omission is of the award being made a rule of court. Now this is not in the arbitrators power to award; for it lies in the breast of the Court whether they will do it or not, and therefore can be no part of the award; for the most the parties can do is, to endeavour that it may be made a rule of court.

AS TO THE LAST OBJECTION, which goes to the substance of the award, the submission is in as general and comprehensive words as possible, "of all actions and causes of actions depending between the parties, &c." The plaintiff is executrix to her

(*a*) See *Chandler v. Bland*, 10 Mod. 140. (*c*) See *Chandler v. Bland*, 10 Mod. 140.
 (*b*) *Duckworth v. Tunstall*, 2. Barnes, 150. Ante, (*d*) See *Chandler v. Bland*, 10 Mod. 140.
 (*e*) See *Chandler v. Bland*, 10 Mod. 140.

husband,
 husband,
 husband,

ELLISON
against
COMYN.

husband, and it does not appear there was any other dispute between them than as executor, &c. Shall therefore the putting in these words by way of explanation and strengthening the award make it bad and of no effect which otherwise would be good? In the cases (a) in the margin the submission was general, as here, "of all actions, &c. between A. and B.;" the arbitrators awarded a controversy between A. and B. in right of his wife, as administratrix to J. S.; and it was held good, and to be included under the general words.

If the submission be clear, there needs no averment on the plaintiff's side; but if the defendant has anything to alledge against the award, he ought to plead it specially, and shew wherein it is bad.

It is objected, the general releases which are to be given must be given in both the rights, which was not intended by the submission. But it will be for the defendant's advantage to have a double release, and therefore ought not to be objected to.

IT WAS REPLIED for the defendant, That the case in *Roll. Abridgement* and in *Bulst.* is different from this case, because there by the intermarriage the husband was liable for the wife's debts, and they are considered but as one person, and the husband is entitled to all she has. But in the case of an executorthip the plaintiff sues in *autre droit*, and will be liable only as long as there are assets.

This case was twice argued. On the first argument (*absente* LEE, Chief Justice) THE COURT said:

PAGE, Justice. At present I think, that the action is well brought, and that these objections are of no weight. It is said, that the award ought to be under the seal of the arbitrators as well as in writing. But I think there is no occasion for it; for on the statute of Frauds, where certain agreements are ordered to be put into writing, it is not said they shall be sealed by the parties, because the perjury is prevented without it. Here the award is set out on *oyer*, and it appears by the *testatum* to be under hand and seal both.

AS TO THE SECOND OBJECTION (or rule of the award not being set out), I think here is sufficient, for there is nothing omitted but the making it a rule of court, which is not in the arbitrators power to enforce.

AS TO THE LAST OBJECTION, It is true you cannot join a demand in your own right and as executor both in the same action; but it appears to me, that the intention of the parties in this submission was, to determine and end everything that was in dispute between them, whether in their own right, or as executor; and therefore I think the arbitrators have not exceeded their power.

PROBYN, Justice. If the arbitrators do not exceed their commission, it is no matter when the accord is made, either before or

(a) 1. Roll. Abr. 246. pl. 2. 3. 3. Bulstr. 65.

upon

ELLISON
COMPL.
COMPL.

upon the day limited by the submission; and therefore it need not be shewn when it was made. Your position is right, that a deed is not good unless it be sealed; but in awards it is otherwise, for it may be by deed or writing without seal, or by parol only; and if the plaintiff shew that they have done their duty, and not exceeded the submission, that is sufficient.—As to making the award a rule of court, that is no part of the condition, but separate from it.

To the objection, That the arbitrators have exceeded their authority in awarding a matter which was not submitted to them; it is not recited in the bond of award that there was any dispute between them as executor; only said in general, “of all disputes, &c.” Therefore it is a doubt with me, whether they had any authority to determine anything between them as executor. Here is a sum in gross awarded in satisfaction of all actions in their own rights, or as executor; and no notice is taken how much is due as executor, and how much in their own rights; so that it cannot be distinguished how much is assets, and how much not. But I give no opinion as to that yet.

CHAPPLE, *Justice*, of the same opinion as to the first three objections, that they are of no weight.

TO THE LAST OBJECTION, The words are here as general as it is possible for them to be. But then it is said, “depending between the parties, or either of them.” And it does not appear that there was a dispute between them as executor. Here it is confined to pay what is due to the plaintiff as executor, &c. In *Roll. Abridgment* it was held, a grant of “*omnia bona et catalla*” would only pass what the grantor had in his own right, and not what he had as executor. So here will “all and all manner, &c.” determine everything.

On the second argument,

LEE, *Chief Justice*. The material objection here is, that the arbitrators have exceeded the authority given them by the submission. But I do not see how it could be more general and extensive than it is here. The case of the release of *omnia bona sua* does not seem to come up to this case, because the word “*sua*” there confines it to the goods which he had *suo jure* only. But here the submission is “of all actions whatsoever;” and though it appear in *Cro. Jac.* 447. that there was an averment that the controversy between them as executor, &c. was submitted, as well as any other, yet there has been no case cited to shew that an averment is necessary. The case in *Roll. Abr.* 246. pl. 2. & 3. is exactly to this case. The plaintiff may make such averment if he please; but I think the arbitrators have done rightly, and that judgment ought to be given for the plaintiff.

PROBYN and CHAPPLE, *Justices*, were now of the same opinion with PAGE, *Justice*, as before.

Judgment was accordingly given for the plaintiff.

Marti

Martin against Jenkins.

Case 319.

THE PLAINTIFF prayed a *mandamus* to the Mayor of Winchelsea to return him mayor for the said corporation, he being duly elected, &c.

A jurat who has neglected to take the sacrament pursuant to 13. Car. 2. c. 1. may be elected mayor; for the 5. Geo. 1. c. 6. f. 3. prevents him from being proceeded against on account of this omission.

S. C. 2. Stra. 1145.
2. Burr. 1013.

At the trial at *nisi prius*, on an issue whether he was duly elected or not? A CASE was made (a), which stated, That by the constitution of this borough no person can be mayor till he has been a jurat in the corporation; and that the plaintiff was elected a jurat before, but had neglected to receive the sacrament within twelve months before such election, as is expressly required by the 13. Car. 2. c. 1. which enacts, "That none shall bear any office of magistracy, or other employment concerning the Government of any cities, corporations, boroughs, cinque ports, &c. that shall not, within one year before their election, have taken the sacrament according to the rites of the church of England." Then comes the statute of 5. Geo. 1. c. 6. f. 3. which enacts, "That all the new members of corporations, and every person now in actual possession of any office, that were required by the act of 13. Car. 2. to take the sacrament of the Lord's Supper, according to the rites of the Church of England, within one year next before his election, are hereby confirmed in their several offices, notwithstanding their omission to take the said sacrament." Nor shall any person "hereafter to be chosen to any of the said offices be removed by the Corporation, or otherwise prosecuted, for such omission, nor shall any incapacity, &c. be incurred thereby, unless such person be removed, or such prosecution be commenced, within six months after his election; and in case of a prosecution, the same be carried on without a wilful delay." The plaintiff had not received the sacrament within one year before he was elected jurat, but had been a jurat more than twelve months.

The question was, Whether this statute of the 5. Geo. 1. c. 6. had so dispensed with the taking the sacrament as to enable him to be mayor? or, Whether the omission of it disqualified him from being a jurat?

PRICE, *Serjeant*, urged, that this statute was made only to quiet corporations in their several offices after they had enjoyed them for some time undisturbed; that the statute relates only to that particular office in which the sacrament is ordained to be taken, but did not extend to help him in his qualification for any other office; only that he should not be removed from or prosecuted in that particular office where the omission was but within six months; and that therefore this case was out of the act, which is not a prosecution against the plaintiff to disturb him in his office of jurat; but he is plaintiff himself, and prays the *mandamus*, and therefore ought to shew himself a complete jurat according to the act of

(a) It is said, 2. Stra. 1145. to have been a special verdict.

MARTIN
against
JENKINS.

13. Car. 2. ; and that according to the custom of the corporation he is qualified to be a mayor.

THE COURT were all of opinion, that the words "no incapacity shall be incurred thereby" must take in all incapacities which may be occasioned by the omission of not receiving the sacrament ; and that is an incapacity which is helped by the statute 5. Geo. 1. which does not only take in that particular office before which the sacrament is omitted to be taken, but also any subsequent office in which the completing the first office is any way concerned.

In what case a
negative finding
is not necessary.

But an objection was started by CHAPPLE, *Justice*, that as the plaintiff makes use of the statute of 5. Geo. 1. to bring himself out of the 13. Car. 2. he ought to shew himself to be within the description of the act in all particulars ; and that it is not found, that an action or prosecution was not commenced within six months against him ; it is only said, that he continued a jurat till 1740.

LEE, *Chief Justice*, seemed to think, that if any prosecution had been commenced against him, the defendant ought to have shewn it. But of this they said they would consider.

Afterwards, in the same Term, THEY ALL AGREED, that sufficient was found to entitle him to his office of mayor, for they have not found anything to avoid the election of a jurat, which was legal, only that the plaintiff did not receive the sacrament, which does not make the office void, but voidable only ; and they have not found that he was removed or prosecuted for it, which ought to have been shewn on the defendant's part.

Judgment for the plaintiff.

Case 320. Smith, on the Demise of Dormer, against Parkhouse and Others.

S. C. 3. Atk.
135.

IN AN EJECTMENT a special verdict was found; that *John Dormer*, on the marriage of his son *Sir John Dormer*, settled the premises in question, of which he was seised in fee, "on *Sir John* his eldest son for ninety-nine years, if he should so long live, "remainder to his wife (as to part) for her life, remainder to "trustees to support contingent remainders, remainder to the first "and other sons in tail male, remainder to trustees to raise portions "for daughters, remainder to *John Dormer* for life ; and from "and after his decease, remainder to the use of *Robert Dormer* " (the judge), second son of *John Dormer*, and his assigns, for and "during the term of ninety-nine years, if he so long live ; "and from and after the death of the said *Robert Dormer*, or other "sooner determination of that estate, then to and for the use of "trustees and their heirs for and during the natural life of the said " *Robert Dormer*, to preserve contingent remainders ; and after " the

"the end or other sooner determination of the said term, remainder to the first and other sons of *Robert* in tail-male, remainder to *Fleetwood Dormer*, third son of *John*, in the same manner, remainder to *John Dormer* in tail male, remainder to his brothers in the same manner, remainder to *Euseby Dormer* his nephew (under whom the present plaintiff claims as his son and heir male) for ninety-nine years, if he should so long live, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail male, remainder to *John Dormer*, the settlor, his heirs and assigns, for ever." They find, that *Robert Dormer*, upon the death of his brother *Sir John Dormer* without issue, and the determination of the other precedent remainders, became possessed of the premises in question for ninety-nine years, if he should so long live, remainder as above limited. That the said *Robert Dormer* had a son, *Fleetwood Dormer*, and no other issue male. That in *Easter Term*, in the twelfth year of *George the First*, the said *Robert Dormer* and his son *Fleetwood* levied a fine and suffered a recovery of these premises. That *Fleetwood* died without issue in the life-time of *Robert*; and that *Robert Dormer* afterwards died without issue male, leaving four daughters, *Mary*, *Elizabeth*, the wife of *Sir John Fortescue Aland*, *Ricarda*, wife of the defendant *Parkhouse*, and *Catherine*, who are now the defendants. They find the several entries of the defendants, and that *Euseby Dormer* left issue male the present lessor of the plaintiff, who likewise entered upon the defendants, and made the demise to the plaintiff *Smith*.

SMITH,
ON THE
DEMISE OF
DORMER,
against
PARKHOUSE
AND OTHERS.

This case was twice argued at the Bar; by DENNISON and CHUTE for the plaintiff, and by HOLLINGS and FILMER for the defendants.

THE GENERAL QUESTION was, Whether the recovery suffered by *Robert Dormer*, the judge, and his son *Fleetwood*, was a good bar of the estate-tail? And this depended on the three following questions, which are dependent on each other:

FIRST, Whether by the fine levied in *Easter Term*, in the twelfth year of *George the First*, by *Robert Dormer* and *Fleetwood* sufficient passed to make a good tenant to the *præcipe*?

SECONDLY, Whether the freehold, at the time of the fine and recovery suffered, was in *Robert* or *Fleetwood*? or, Whether it was in the trustees?

THIRDLY, Whether the estate limited to *Robert* for ninety-nine years, remainder to the trustees as above, be a contingent or vested estate in the trustees?

The plaintiff claimed as heir male of the last remainder-man, under the settlement of *John Dormer* on the marriage of *Sir John* his son; and he contended, that as *Robert* (under whom the defendants claimed) was only a tenant for years, he could not, even with his son's joining with him, make a good tenant to the *præcipe*; and

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that the fine levied by him in *Easter Term*, in the twelfth year of *George the First*, was a forfeiture of his estate, which immediately vested in the trustees in possession, so that the freehold being in the trustees, and they not parties to the recovery, it will be no bar to the lessor of the plaintiff, who is the remainder-man in tail male under this settlement.

The defendants said, that the trustees have only a right of entry which is contingent, and not a vested estate; for *Robert* might outlive the ninety-nine years, and have a son living, and then the trustees could not have taken at all, for there would have been a person *in esse* to have taken. That the limitation of this estate is repugnant and uncertain, and therefore void; it is first limited to the trustees after the death of *Robert*, for *Robert's* life; and then, after the end or other sooner determination, to the first and other sons, &c. That the fine levied by *Robert* and *Fleetwood* is not void, but voidable only, and therefore will be good, till avoided, to make a good tenant to the *præcipe*.

The plaintiff replied, that though the fine is uncertain when the estate will vest in the trustees in possession, yet it vested in point of interest immediately, *reddendo singula singulis*, according to *Leon. Lovey's Case*, 10. Rep. 85. b. else how can it support another estate that is contingent, unless itself vested somehow? for one contingency cannot support another. That upon *Robert's* levying the fine he committed a forfeiture, and then the estate vested immediately in the trustees in possession which before vested only in interest; and that the words "other sooner determination" mean sooner than the natural death of *Robert Dormer*, which may be by surrender, forfeiture, or effluxion of time. That marriage-settlements are construed as favourably as wills; and therefore the law, in support of the intention of the parties, will help any uncertain words or mistakes, as the *vitium clerici*, and not make it void for little uncertainties or mistakes. That the estate is not to be left to the mercy of the trustees, whether they will enter or not. Therefore upon *Robert's* committing the forfeiture by levying the fine, the law will suppose they immediately entered as they ought.

This Term, the Chief Justice delivered the opinion of the Court.

LEE, Chief Justice. Upon this special verdict the questions are,

FIRST, Whether the common recovery in which *Fleetwood* the son was vouched be a good bar of this estate-tail? And that depends on this point,

• SECONDLY, Whether there was a good tenant to the *præcipe*? The tenant was made by *Robert* the judge, who was a lessee for ninety-nine years, if he so long lived, and by *Fleetwood* the son, to whom the remainder was limited in tail. And though *Robert* was but a tenant for years, yet it is said,

FIRST, That by this fine a freehold passed, for that it was not void, but at most only voidable.

SECONDLY,

SECONDLY, That if the fine levied by *Robert* was not alone sufficient to pass any freehold, yet by the son's joining with his father they both made a good tenant to the *præcipe*, notwithstanding the estate limited to the trustees to support contingent remainders, which it is said is either void in its creation, or at least contingent only, and never vested; and that this limitation passed no estate to the trustees, only gave them a right of entry to the purpose of the trust.

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FIRST, As to the fine levied by *Robert*, no case has been cited to prove it effectual, and the law is now clear and settled, that a fine levied by tenant for years by reason of the inability of his estate, *nihil operatur*, for being in the realty it is necessary that the person who suffers it should have a freehold. So is *Saffyn's Case* (a), 3. Co. 78. *Fermor's Case*, Hard. 400. And so was it held in the case of *Hunt v. Bourne*, in Salk. 339. which I cite from a manuscript of LORD HOLT's, where he says, that if tenant for years make a feoffment in fee, this devests the whole estate of him in reversion; but if he levy a fine, *nil operatur*; by which it is plain he meant no freehold passes, because he puts a fine in opposition to a feoffment, which devests the estate, but a fine does not; and it may be alledged, *quod partes finis nil habuerunt*; that a fine is improperly called a feoffment on record, and has only the effects of a feoffment to some purposes, if he who levied the fine was seised of the freehold at the time of the fine levied; and of that opinion was LORD MACCLESFIELD, in the case of *Carter v. Barnardiston* (b).

Taking it then that this fine had no effect to pass a freehold, I will now consider what effect *Fleetwood's* joining with his father in the fine and recovery will have; and as to that it is certain, if there was any freehold in *Fleetwood* the recovery will be a good bar.

BUT WE ARE ALL OF OPINION, that the freehold was not in *Fleetwood*, and that the remainder to the trustees to preserve the contingent uses was not void nor contingent, but a vested estate, and that it cannot be construed as giving only a right of entry, as has been insisted at the Bar. In *Co. Lit.* 143. a. there is this description given of a remainder, "that it is a remainder or remnant of an estate in lands or tenements expectant upon a particular estate created together with the same; and it is so expectant upon the particular estate, that either it must take effect the instant in which the particular estate determines, or else it is void." The reason given at the Bar to prove this a void remainder is, that it is limited to the trustees to commence after *Robert's* death, and then afterwards to hold during his life; which it is said is repugnant. Were there no other words to explain those, there might be some force in the objection. But the words are, "and from and

(a) 5. Co. 123.

(b) 1. Peet. Wms. 119.

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"after the death of the said *Robert Dormer*, or other sooner determination of his estate, then to the trustees, &c.;" which words, "or other sooner determination," answer the objection, and must mean, by surrender, forfeiture, or effluxion of time, which may happen sooner than the death of *Robert*; and so here are words to make this a reasonable limitation, and possible to take effect. But in answer to this it was insisted, that where a remainder was limited to take effect on two disjunctives which cannot stand together, one of them being impossible (as in this case a limitation upon *Robert's* death to hold during his life), there the Court will not reject the impossible disjunctive, but construe the whole limitation void. And to prove this was cited the case of *Cumberford v. Birche*, 2. Lev. 157. where a settlement was made with a proviso, that if none of the brothers of the grantor, or their children, were living at such a time, then he gave the estate to his brothers successively; and the Court held it to be a void limitation. But I think that case does not come up to the present, for the Court did not determine upon the absurdity or impossibility of both the disjunctives taking place (it being limited to his brothers after all his brothers deaths); but the ground of their opinion was, that the death of the brothers children was a condition precedent, and therefore whilst they were living the remainder to the brothers could not take effect. Now here the death of *Robert* could never be intended as the only condition upon which the remainder to the trustees should take effect, but only as a sooner determination, as is afterwards expressed.

SECONDLY, In the next place it is said, that supposing the remainder was not void in its creation, and that it was possible to take effect at first, yet it is contingent, and is now become void by event; for it was uncertain not only as to the time when the determination might happen, but likewise whether it might ever happen, for *Robert* may have been presumed to have outlived the term. But I think this is a mistake, and that there is no warrant for such a position by any rules of law.

Contingent remainders are of three sorts.

FIRST, When it is a limitation to one not *in esse*; for in that case, if the remainder-man never come *in esse*, it is a void remainder.

SECONDLY, When the particular estate may determine before the remainder can commence; as to *A.* for life, remainder to *B.* to commence upon the death of *C.* the remainder to *B.* is gone.

THIRDLY, When there is a condition precedent, or something to happen before the remainder can take effect, which may never happen at all; as a remainder to commence when *J. S.* shall return from *England* to *Rome*.

Now the present remainder cannot be said to be contingent within any of these three descriptions: For, first, here are persons *in esse* to take; secondly, the remainder does not depend on the death

death of Robert, for it is limited "from any sooner determination of the estate," so that immediately upon the expiration of the particular estate the remainder is to commence; thirdly, nor is here any precedent condition to be performed in order to give the trustees a title. In our case, the remainder depends on such facts which must determine the particular estate from the nature of the estate itself, and which were understood so to be when the remainder was originally created; for all estates for years determinable on the lessor's lives may determine not only by the death of the party or effluxion of time, but also by surrender or forfeiture; and such the law takes notice of, and will expect, as appears by 2. Co. 151. *Cholmley's Case*, and 1. Saund. 151.: as a lease for life to A. remainder to another during the life of A. this is good only by possibility that the remainder may take effect by the tenant's for life aliening or committing a forfeiture. And this therefore is considered as an interest in the grantor which he may limit, and as that sort of estate which trustees have for supporting contingent uses, and is not a mere right of entry, nor a contingent remainder, but a vested estate to take effect by those ways and methods of determination to which the particular estate was subject when it was created. And for this *Ca. Lit. 42. a.* puts a case which explains this matter exactly. If tenant for life, says he, make a lease by deed, or without deed, to him in the remainder or reversion, in tail or in fee, for the life of him in the remainder or reversion, and afterward he in the remainder or reversion take a wife and die, his wife shall not be endowed, but the particular tenant shall enjoy the land again; for it cannot be a forfeiture, he in the remainder being party to the alienation; and it cannot be a surrender, because his whole estate was not departed with. So here the possibility of the lessee's dying in the lessor's life-time, or his forfeiting or surrendering the estate, still remains in the grantor, and is what *Lord Coke* calls a freehold, and puts this case as an instance, where there may be several freeholds derived out of the same estate; and though it is but a possibility, yet it is sufficient to prevent the wife of him in remainder from being endowed. Agreeably to this is *Duncombe's Case (a)*: A. tenant for life, remainder to J. S. and his heirs for the life of A. remainder to A. in tail; the Court held, that the remainder to J. S. though but a possibility, was such an interposing estate between the estate first limited to A. for life, and the last estate limited to him in tail, that A. could be considered as no more than a bare tenant for life, and consequently his wife could not be endowed: which seems to be our very case as to this point; for I take it, that J. S. could be no other than a trustee there for preserving the contingent uses; though the case is not so fully reported.

Thus much to shew upon what ground limitations to trustees made in common form must operate.

(a) 3. Lev. 437.

SMITH,
ON THE
DEEDS OF
DONORS,
against
PARKHOUSE
AND OTHERS.

SMITH,
ON THE
DENIAL OF
DORMER,
against
PARKHOUSE
AND OTHERS.

The next thing is to consider, What construction the present limitation ought to have?

And I think it operates in the same manner as the common limitations do; I mean, that part of it which is called contingent, and takes its name from the words "or other sooner determination." The common kind of limitation is, first "to *A.* for life; and from and after the determination of his estate, then to trustees "for the life of *A.*" or else "to *A.* for ninety-nine years, if he so long live, and from and after the end of the term, then to trustees during the life of *A.*" In the first case, the remainder limited to the trustees being to commence during *A.*'s life, it cannot take effect upon the natural death of *A.* nor otherwise than by a surrender or forfeiture of his estate; nor in the second instance otherwise than by effluxion of time or by surrender or forfeiture; or perhaps in both cases by civil death. And I think the same objections which have been made in the present case may as well be made to every limitation for preserving contingent remainders; for though the words "or other sooner determination" are not always inserted, yet there are no trust settlements to be found which do not import as much. In *Bridgman*, 334. there is a like settlement, without these express words, indeed, but the construction upon it must be the same as if they had been inserted, because the remainder is there limited to the trustees only during the life of the tenant for years, and therefore must be construed to commence on a determination of the term before the lessee's death, else it can never commence or take effect at all. The meaning of these limitations is, that when an estate is given to *A.* for life, the limitor has, notwithstanding, an interest remaining in him to enter upon an alienation or forfeiture, &c.; which interest, when conveyed to the trustees, is a remainder or legal estate, which they are said to have for preserving the contingent uses, and is so called by LORD COWPER, in 2. *Vern.* 755. So in the common case of marriage-settlements, where an estate is limited to the first taker, either for ninety-nine years or for life, with a remainder to trustees to support the contingent remainders during his life: WE ARE OF OPINION, that by such limitation a present freehold passes to the trustees, subject to the term of ninety-nine years, in such manner that it cannot take effect until the determination of that term, but that determination must always be in some manner or other sooner than the natural death of the particular tenant. And though this remainder may depend on the trustees coming into possession, or upon a surrender or forfeiture, which may or may not happen, yet such facts are in law possibilities not remote, and not merely contingencies, but vested interests; and it would be of the most dangerous consequence, and might overturn most of the family settlements in the kingdom, if a different construction were to prevail, because it would then be in the power of a *cestui que usque* to bar any settlement without the consent of the trustees.

We are all therefore of opinion, that this limitation did vest a freehold in the trustees, and that the fine levied to make a tenant

Ellice v. Ofborne.

to the *præcipe* was not good, and passed no estate, and so the recovery will be no bar; and that the lessor of the plaintiff must have judgment.

SMITH
against
PARKHOUSE
AND OTHERS.

The King against The Mayor of Weymouth, Dorset. Case 321.

QUO WARRANTO to the defendant for exercising the office of mayor for the borough of *Weymouth*, in *Dorsetshire*, not being qualified.

If a charter authoriseth the mayor and aldermen to nominate four burgesses as candidates for the mayoralty, A BY-LAW, that any burgess, though he is an alderman, may be put in nomination, is void; for it is contradictory to the charter, which confines the nominees to the bailiffs only.

The defendant pleaded, that by letters patent in the fourteenth year of *James the First*, it was incorporated by the name of mayor, divers men called aldermen, two bailiffs, and twenty-four capital burgesses at large; that once in every year the mayor and aldermen are to nominate four of the burgesses, being inhabitants, one of whom is to be chosen mayor by the commonalty at large; that on the Feast of *St. Michael* the mayor and aldermen met together and chose out four of the burgesses, being inhabitants, of whom the defendant *Tucker* was one, and that he was elected mayor by a majority of the burgesses at large; and by this title he claims to be mayor.

The relator in reply admitted the charter as set out, and said, that the four persons so nominated were burgesses and inhabitants, but that the defendant *Tucker* was also an alderman at that time, and therefore disqualified to be chosen mayor, who ought to be chosen from the burgesses at large, and not from the aldermen.

S. C. I. Barn.
26.

The defendant rejoined, and set out a by-law used time immemorial, by which any of the burgesses who were inhabitants may be put in nomination for the mayoralty, though they were aldermen, which will not prevent his being chosen mayor: and then averred, that the defendant *Tucker* was a burgess and inhabitant at the time of his nomination and election.

To this the relator demurred, and the defendant joined in demurrer.

In support of the demurrer two questions were insisted on:

FIRST, As to the pleading, that the defendant's rejoinder is a departure from the plea, for he should have disclosed this whole matter in his plea, and there have set out the by-law, and not have insisted on two different matters, first the charter, and then the by-law; and cited 1. *Inst.* 304. 1. *Lev.* 81. 2. *Lutw.* 1425.

SECONDLY, That supposing the pleading good, yet that the by-law is void in itself, being inconsistent with the charter, and creating a new constitution, and a new method of election, different from what the charter gives: for by the charter, the mayor is to be chosen out of the burgesses at large, but this by-law gives a power of electing the mayor out of the aldermen, which the charter never intended;

THE KING
against
THE MAYOR
OF
WYMOUTH,
DORSET.

intended; and relied on the case of *The King v. Phillips, Mayor of Bodmin*, in *Michaelmas Term*, in the seventh year of *George the First*, where an issue was joined on a by-law, which appeared by the pleadings to be inconsistent to the charter, and held immaterial from what appeared on the pleadings.

THE COURT did not give any opinion on THE FIRST OBJECTION, but rested on the second only.

LEE, *Chief Justice*, said, that if the by-law would have given the defendant any right, he had deprived himself of the benefit of it by the departure in the pleadings; for that the defendant should have shewn his whole case in the plea, and there have set out the by-law.

As to THE SECOND OBJECTION they held, that the by-law would be entirely out of the case; for unless the charter gave a power of electing any of the aldermen to be mayor, the by-law could not do it, for it would be giving a new power to themselves, which the charter did not intend: nor can a by-law explain a charter, for that must be done by the Judges; it can only contract or abridge, and enforce the power given by the charter for the good of the corporation, but cannot increase it: and upon this foundation was the case of *Corporations determined* 4. Co. 77. A. that it was to avoid popular discord and confusion.

This by-law, therefore, will be out of the case: and the question will resort to the charter itself, Whether, as the facts now appear upon the pleadings, here is a power given of electing the mayor out of any of the aldermen as well as from the burgesses at large? or, Whether the four that are put in nomination must be confined to the burgesses at large who are not aldermen?

As to that THE COURT were all of opinion, that by the charter the aldermen are excluded from being elected mayor, which is confined to the burgesses at large, not aldermen; and it would otherwise cause great confusion if the same person was to act in two capacities, when the charter plainly considers them as distinct persons.

Judgment was given for the king.

Case 322.

Jones against Gegg.

Prohibition to a
suit in the spiri-
tual court a-
gainst a clergy-
man for non-
residence, and
keeping a gram-
mar-school
without licence.

LIBEL IN THE SPIRITUAL COURT against *Gegg*, as parson of a parish in *Gloucestershire*, set forth several canons whereby the clergy are required to be resident upon their cures to read prayers on *Wednesdays, Fridays, and Holy-days*; that the defendant resided at *Gloucester* and not upon his living; that he taught a grammar-school at *Gloucester*, without licence from the bishop; and that he continued to neglect his duty and teach school without licence, though admonished by the bishop.

THE

THE COUNSEL, for a prohibition, suggested the statutes Non-residence, and against teaching school without licence; and that Gegg had a freehold in his school, and in right of that a stall in the church of Gloucester, where he was resident, and ought not to be disseised of his freehold; and cited 2. Salk. 550. 1. Vent. 41. Corry v. Pepper, 2. Lev. 222.

IT WAS ARGUED, that the spiritual court ought never to proceed in any case where the answer to the libel would subject the party to a temporal penalty, as it would do here without residence.

IT WAS ARGUED against a prohibition, that the spiritual court had a general jurisdiction over clergymen, and particularly as to their residence and duty; that the statute of *Henry the Eighth* was to prevent dilapidations, and did not take away the jurisdiction of the ordinary.

LEE, Chief Justice. The teaching school without licence is now made a temporal offence, and a penalty given for doing it; so it seems the spiritual court has now no jurisdiction of this offence (a). As to the non-residence, it is a question of too great consequence to be determined upon motion. Mr. Gegg is a clergyman; yet as there is a penalty annexed to non-residence, and no saving of the ecclesiastical jurisdiction, it deserves well to be considered whether it is not extinguished.

So a prohibition was granted to the whole, that the plaintiff might declare.

(a) See Chedwick v. Hughes, Carth. 464. Hill v. Boomer, 2. Jones, 131. 2. Sid. 67.—And masters of grammar-schools must be licensed by the ordinary, who may examine the party applying for a licence as to his learning, morality, and

religion, Rex v. Archbishop of York, 6. Term Rep. 450 and may take a reasonable time to enquire whether he is properly qualified, Rex v. Bishop of Litchfield, 2. Stra. 102. Comy. Rep. 448. Ante, 217.

Dent against Coates.

Case 323.

A LIBEL was preferred in the spiritual court against Mr. Dent, for refusing to pay his share of a church-rate assessed upon him by the churchwardens of Northallerton. Mr. Dent prayed a prohibition to the ecclesiastical court upon a suggestion of this custom; He said Northallerton was an antient parish and consisted of many vills, whereof Romanby was one; that the lands for which he was charged lay in Romanby, in which place there was this custom, that twenty-four of the inhabitants of Northallerton, or the majority of such twenty-four, had, for time out of mind, used to make a general assessment for the repairs of the church for all the parish, and that when such assessment was so made, the churchwarden and so many of the inhabitants of Romanby as should think fit to meet had, for time beyond memory, been accustomed to raise a certain proportion of such general assessment among themselves, distinct from the rest of the parish. And Mr. Dent further suggested, that in the year 1608 the inhabitants of Northallerton and Romanby came to this agreement, that when Northallerton

A custom that the churchwardens of a particular vill, and so many of the inhabitants as shall think fit to meet, shall make a church rate; and that when the whole parish shall pay forty shillings the particular vill shall pay twelve shillings, is void for uncertainty.

S. C. 2. Stra. 1145.

DENT
against
COATES.

Northallerton should assess the whole parish in forty shillings, then *Romanby* would assess itself at twelve shillings.

Upon these suggestions A PROHIBITION went, in which *Mr. Dent* declared upon this custom and agreement. *Mr. Coates*, the defendant in prohibition, pleaded there was no such custom or agreement. These issues went down to trial, and the jury found the custom and agreement as above.

And this day *Serjeant BURNETT*, THE SOLICITOR GENERAL, and *Serjeant DRAPER*, moved in arrest of judgment, and that a writ of CONSULTATION might go upon the following reasons: They argued, that this custom is void for uncertainty. FIRST, It is uncertain who shall make the assessment, for the custom is, that the churchwardens and such of the inhabitants as shall think fit to meet shall make it, and not that the churchwardens and ten or twenty, &c. or the major part, or any other certain number of the inhabitants, shall make it. The custom therefore, as it is laid, depends so much upon the will of the inhabitants, that none of them are obliged to meet; and if none of them do meet, no assessment can be made; and it is not reasonable that *Northallerton* should be charged with the whole. A custom, that tenants of a manor shall not put in their cattle until after their lord has put in his, is void because uncertain; for the lord may never put in his cattle, and it is not reasonable that the commoner should lose his common. A custom that such tenants of the manor as come first to the place where, &c. shall have all windfalls, is void for uncertainty, because it lies in the will of man, and the will of man is uncertain. The custom is also void for the uncertainty of the sum to be assessed, for the custom is to assess a certain proportion towards the general assessment; in which case not only the general assessment is uncertain until it is actually made, but also the proportion which *Romanby* is to advance to it is indeterminate; for the custom is not to raise the third, fourth, or any other certain proportion of it; and upon so indefinite a custom they may advance any proportion whatsoever, sometimes more and sometimes less; and to this they applied the following cases, 1. *Keb. 612.* 2. *Salk. 657.*—2. *Roll. Abr. 264.* *Dal. pl. 1, 2.* A custom that the tenants of a manor ought only to pay two years rent, or less, to renew their copyholds is void, because they are sometimes to pay two years rent and sometimes less: so it is a bad custom to pay a penny, or thereabouts, for tithes for every acre of arable land, because uncertain. *Latch, 217.* A custom to pay to the reparation of a church in proportion to the tax to the king, is void for uncertainty, because it does not appear what the king's tax is.

BOOTLE and *DENNISON* argued for the plaintiff in prohibition, that as the verdict had found the custom, the uncertainty could now be taken no advantage of; for that which might be an objection and taken advantage of before verdict cannot be so afterwards;

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against
COATES.

wards: and for the goodness of the custom cited *Carib. 12. 3. Lev. 255.* that a custom to pay for a time certain a year's value of the land at the time of admission is certain enough, and issuable and triable by a jury, whether it be of such yearly value or not.

THE COURT. This is a controversy between one part of a parish with another part of the same parish, and the original proceeding in this cause is a libel in the spiritual court upon an assessment made by the churchwardens of *Northallerton*, in which *Mr. Dent*, who prayed the prohibition, is rated; and a prohibition went upon a suggestion of the custom, for though the ecclesiastical court has jurisdiction in church rates, yet it cannot try a custom, because a matter at common law. The consideration before us is, whether the custom is such a one as will excuse *Mr. Dent* and the rest of the inhabitants of *Romanby* from the ordinary and common method of assessing. Nothing is clearer than that if the Court sees upon the face of the record a custom that is uncertain or unreasonable in the nature of it, the finding it by verdict will not give any force to it, for it is matter of law, with which the jury cannot intermeddle. The Court indeed, after verdict, will excuse want of form in a record, if the substance appear to be such as will entitle the plaintiff to a verdict; though such deficiency of form might have been taken advantage of by demurrer before verdict; but that is not the case here, for the custom is not matter of form, but the substance of the thing in issue; and the jury finding a custom cannot authenticate it, for that is a matter proper for this Court. And to descend to the custom itself, there are two strong objections to invalidate it, both for the uncertainty and unreasonableness of it. The custom is, that the churchwardens of *Romanby*, and such of the inhabitants as shall think fit to meet, shall make the assessment; which is uncertain, for it does not require the majority, or any certain number of the inhabitants to make it. The other and the stronger objection is, of one part of a parish prescribing against another part of the same parish, to assess themselves at what they shall think fit; for if the twenty-four inhabitants of *Northallerton* shall make the general rate at ten pounds, it will be in the power of the inhabitants of *Romanby*, by this custom, to assess themselves at one farthing. Nor do we think the agreement in 1608, which says, that when the general rate is at forty shillings for the whole parish, that *Romanby* shall assess itself at twelve shillings, will at all aid the custom; for we cannot go upon the agreement, but must judge upon the foot of the custom itself; for it does not follow from this agreement that the usage was in this certain proportion before, though it may be an inducement to the jury to believe that the custom was so before: besides, to consider the agreement as such, it cannot at all bind the succeeding parishioners; for though parishioners may be bound by their own contract, yet they are not such a corporation as to bind their followers. It will be nothing to say how justly *Romanby* has, or how equitably it will, assess itself;

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against
COATES.

self; for if this Court was to authorize *Romanby* in this custom, it would be at least putting it in its power to act unreasonably, which this Court will never do.

Therefore no judgment must be given, and a consultation must go.

Case 324.

The King against O'Brian.

To forge an affidavit for the purpose of obtaining money due to an officer's widow from the treasurer of the king's bounty, is indictable at common law.

S. C. 2. Stra.
1144.
S. C. 2. Sess.
Cases, 366.

O'BRIAN was indicted at the Old Bailey for publishing a false, forged, and counterfeit affidavit, well knowing it to be so, purporting it to be sworn before *Mr. Engerr*, a justice of peace, the contents of which were, that *Mrs. A. B.* being an officer's widow, and entitled to the yearly pension of sixteen pounds, was living and in *Ireland*, although she was dead, and this with an intent to deceive *Mr. Sainthill*, the treasurer of the king's bounty for officers widows; and also for publishing a false, forged, and counterfeit certificate, knowing it to be so, purporting to be signed by the parson and churchwardens of *D.* the contents of which were, that *Mrs. A. B.* was alive and dwelling in the same parish of *D.* in *Ireland*, although she was dead; and that one *Burrough*, by virtue of the said forged affidavit and certificate, received of the said *Mr. Sainthill* the sum of eight pounds ten shillings, part of the same pension (a).

O'Brian was found guilty upon this indictment, and being brought up from *Newgate* to the king's bench, and the Attorney-General demanding judgment against him, it was moved by SERJEANT HAYWARD and MR. KETTLEBY to arrest it.

THE COURT. This is an indictment at common law upon which the prisoner stands convicted; and among others, the two principal reasons given to arrest judgment in this case are, FIRST, That even the forgery of such an affidavit and certificate is no offence at common law, and should have been proceeded upon on the statute 33. Hen. 8. or some subsequent statute upon forgery. SECONDLY, that if such forgery be an offence at common law, yet the bare publication, of which O'Brian is only guilty, is not so. But we take this forgery to be an offence at common law, as it is to the prejudice of the king and subject, in causing a misapplication of the public money; and we are justified in our opinion by the resolution of Lord Chief Justice RAYMOND and the rest of the Judges, in the case of *The King v. Ward* (b), where after conviction it was moved in arrest of judgment, and the same exception taken as here, that it was a charge upon which an indictment would not lie at common law, it being only a forged indorsement upon paper, whereby *Ward* had entitled himself to a large quantity of alum; that it was a false token, and the indictment should have been upon the statute of 33. Hen. 8.; but the Court

(a) See the statute 9. Geo. 3. c. 39. (b) 13. Geo. 2. 2. Stra. 747. 2. Ld. 1. 6. and the case of Jones and Palmer, Ray. 1461. Ray. Ent 538. 1. Barn. Cases Cro. Law, 295. 10.

over-ruled the exception, and were of opinion, that the indorsement was to be considered as a writing upon which *Ward* was indictable at common law, it being of such a nature whereby another person might be prejudiced; but if upon such forged indorsement no prejudice could have arisen to anybody, then it would have been no crime, and not indictable. The statute of 33. Hen. 8. made no new offence, but only added a greater degree of punishment to the old ones (a); and this statute, as well as several others that have created superior kinds of punishment to offences that were such at common law, have still left the prosecutor the election of proceeding either upon those statutes or at common law: This was the resolution in the case of *The King v. Ward*, and is ours in the present case. It has indeed been determined (b), that where a person got goods from a person on *Ludgate-hill* by a false verbal message from *The Duke of Buckingham*, that he was not indictable at common law: and also resolved in the case of *The King v. Newney* (c), that a bare false affirmation does not amount to any crime indictable at common law, for people must not be so imprudent as to credit messages or affirmations by word of mouth. But when such a fact as this of *O'Brian's* appears upon an indictment, which is not the case of words, but is a matter in writing, which bears the greatest probability of being true, and against which it is not in the power of a person to defend himself, it is indictable at common law; and it would be a reflection on the common justice of the nation to say it could overlook such an offence as this.

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against
O'BRIAN.

As to the latter objection WE ARE ALSO OF OPINION, that the publication of such a forgery as this is indictable at common law. Indeed if *O'Brian* had not known the affidavit and certificate to be forged, and had innocently published and delivered them to *Burrough* as authentic ones, and *Burrough* had thereupon received part of the pension, *O'Brian* had not been guilty of any offence; but the indictment charges, and it was proved upon evidence, that *O'Brian* knew them to be forged when he published them; so the intention and knowledge plainly constitute the offence, and make it punishable at common law; and it is clear that the publisher of a libel is punishable as well as the author.

There was ANOTHER OBJECTION, that the publishing the affidavit and certificate are several offences, and should not have been charged in one and the same indictment. This objection would have been of weight, if the affidavit and certificate had been several offences, and could have had independent punishments: BUT WE ARE OF OPINION, that no part of the pension could have been received without both an affidavit and a certificate of the widow's being alive, both being required by the treasurer of the king's bounty; if so, these are not several independent offences,

If an affidavit and certificate are necessary to perpetrate a fraud, the forgery of the one and the publication of the other is one offence.

(a) See Term Rep.

(b) Rex v. Puckney, 1. Sess. Cases,

198. c. 172.

(c)

but

The King
against
O'Brian.

Judgment on a
conviction of
forgery at com-
mon law.

but are only two different facts that are constituent parts of one and the same crime.

The judgment was, **FIRST**, To be carried by the marshal through all the courts in *Westminster Hall*, with a paper fixed on his forehead describing his offence; **SECONDLY**, To be imprisoned for one year without bail or mainprize; **THIRDLY**, After imprisonment to find one thousand pounds security for his good behaviour for seven years, *viz.* five hundred pounds himself, and two substantial sureties two hundred and fifty pounds a-piece; and to be re-imprisoned until such security found.

O'Brian was found guilty upon another indictment for a second offence of the same nature; and the judgment upon the second conviction was, that *O'Brian* stand in the pillory at *Charing Cross* for one hour, between the hours of twelve and three, and to be fined five pounds.

THE MARSHAL, in pursuance of the sentence, took *O'Brian* out of court, and returned with him with a large parchment fixed round his head, on the fore-part of which his offence was written in very large characters. *O'Brian* stood upon a bench, at the back side of the counsellors bar, for about half a minute, and then the Chief Justice ordered him to be withdrawn and carried through the other courts, which the marshal accordingly did, and then took him to his imprisonment.

Case 325.

Morgan against Griffith.

A replevin bond is good, although it do not appear to have been taken by the sheriff *virtute officii*.

THIS is an action by *Paul Morgan*, sheriff of *Monmouthshire*, upon a replevin bond entered into by the defendant. *Oyer* was prayed of the condition, which upon reading appeared to be, "that *Morgan Bray* do and shall, at the next court of the said *Paul Morgan*, the sheriff, cause to be prosecuted with effect the plaintiff of *Thomas Thomas*;" and then the defendant *Griffith* pleaded a plaint levied by *Morgan Bray*, at the next county court, against the said *Thomas Thomas*, and made that a performance of the condition. The plaintiff, to shew a breach, replied, and set forth the further proceedings on this plaint, that there was a *recordari facias loquelam*, upon which the plaint was removed into this court, and that judgment was thereupon given against the plaintiff in replevin by default: the replication goes on further in these words, "and so the said *Thomas Thomas* says, that the said *Morgan Bray*, in the condition named, has not prosecuted the said plaint with effect, and this the said *Paul Morgan* is ready to verify." **MR. ROBINSON** took many exceptions to these proceedings, as they appear upon this record:

FIRST, That it is not set forth in the declaration, that this bond was entered into to *Paul Morgan* in the name of the sheriff, and that such bond is void if not taken in the name of office.

THE

MORGAN
against
GRISTITH.

THE COURT (a). It is clear indeed that in an action for taking bail on the statute 23. Hen. 6. the bond must appear to the Court to be taken *virtute officii*, because the statute makes bonds otherwise taken void, but no statute interposes in the present case: AND THE QUESTION is, Whether this bond, upon *oyer*, appears to be taken in the name of office? AND WE ARE OF OPINION that it does appear to be so taken, because the word "sheriff" is interspersed through the condition; as that if judgment be against the plaintiff, he will return the goods replevied to the sheriff, and that he will indemnify the sheriff, &c. which are sufficient tokens that the bond was taken by the sheriff in his public capacity: besides there has been no case cited to shew that it is necessary at common law, to set forth in the declaration that the bond was given to Morgan by the name of sheriff.

ANOTHER EXCEPTION is, That there is no *return habend.* upon the judgment in replevin against the plaintiff. In what case a return habend. is not necessary.

AND WE ARE OF OPINION that there is no occasion in the present case for one; for in all replevin bonds there are several independent conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any of these distinct parts of condition; and the breach assigned in the present case is, that the plaintiff, in replevin did not prosecute with effect; so that a *return habend.* is not at all material upon the breach in this case. See Gibb. Rep. 95.

A FURTHER EXCEPTION is to the replication, that it is bad, because Thomas Thomas, who is a stranger to the record, speaks in one part of it and says, that Morgan Bray has not prosecuted the plaintiff with effect. A clerical mistake in an immaterial part of a replication, will not vitiate it.

BUT WE ARE OF OPINION that this is a mistake in the clerk, and that it does not vitiate the replication, for it is immaterial and no more than surplusage; for there appears to the Court, upon the former part of the replication, a sufficient breach of the condition, for it sets forth a judgment upon the *recordari facias loquelam* against the plaintiff in replevin; and there appearing to us such a breach, we will make the same inference as Thomas Thomas has done, though it had not been expressed in the replication at all.

THE LAST EXCEPTION to the plaintiff's recovering is, that the condition of the replevin bond has been answered by the levying of the plaint in the county court. A replevin bond can only be discharged by a successful prosecution of the suit.

But we can see no foundation for that, for in all these sorts of bonds, to prosecute with effect, the plaintiff must not only proceed

(a) LEE, Chief Justice, in Michaelmas Term, 14. Geo. 2. delivered this opinion of the Court, which consisted of PAGE, and CHAPPEL, Justices; PROBYN, Justice, being removed from this court to be

Chief Baron of the Exchequer; and WRIGHT, Justice, who was appointed in his stead, not having yet taken his seat.

MORGAN
against
GRIFFITH.

to a decision of the suit, but must have success in it, or he does nothing; and it is not a completion of the condition to have levied a plaint in the county court, for the words extend to all the proceedings from the original to the conclusion of the action, as well in the court below as in the superior court, by *recordari facias loquelam*, which is the case in *Carth.* 249. And there are several precedents of bonds with the like conditions as this, as 1. *Lutw.* 687. *Dalton's Sheriff*, 440. *Lil. Ent.* 124. 174.

Case 326.

The King against Seymour and Others.

An information for extortion granted against justices of the peace, for refusing to grant licences to publicans unless on the payment of ten shillings although this had been the practice of the borough for twenty five years before.

1. *Str.* 413.
1. *Term Rep.* 692.

SEYMOUR, *Boyce*, *Blatch*, and *Duffield* attended at the king's bench in order to receive judgment, upon their being found guilty upon several informations.

CHAPPLE, the junior Judge, having attended BARON CARTER, who tried the informations, reported to the Court, that there were three several informations, one against *Seymour*, and *Boyce*, a justice of peace; another against the same *Seymour*, and *Blatch*, a justice of the peace; and a third against the said *Seymour*, and *Duffield*, a justice of the peace.

The offence stated in the information, was matter of extortion used by *Seymour* and the three justices against several foreigners who were settled in the corporation of *Colchester*, and who had applied to those three justices for licences to sell ale.

The proceedings were thus: *Seymour* and these three justices met in order to grant licences to sell ale; when the burgesses applied they had their licences upon the common and ordinary terms, but when any foreigner came for a licence, the constables who were stationed to guard the outward door suffered none but the foreigner who applied for a licence to enter into the first room, where *Seymour* was; and the general question *Seymour* put to the foreigner was, Whether he was willing to pay ten shillings for his licence? If he refused he was dismissed, but if he agreed to pay it to *Seymour* his sureties were called, and he was admitted to go along with them into the room to the three justices, where his recognizance was taken and his licence granted. These informations were tried by three special juries of gentlemen; the facts charged were very fully proved upon the trial; and there were above one hundred licences granted at the rate of ten shillings a-piece.

When CHAPPLE, Justice, had certified as above, SERJEANT PRICE and MR. BOOTLE moved, in mitigation of the fines that should be set by the Court, upon several affidavits to shew *quo animo* the fact was done, as that such fines had been taken for twenty-five years past; that this whole procedure was by the consent and direction of all the other ruling members of the corporation; and that the money was applied to public uses, as for repairing bridges, streets, &c.

THE

THE COURT suffered the affidavits to be read, though it was opposed by the Counsel on the other side (a).

THE KING
against
SEYMOUR
AND OTHERS.

THE COURT. This crime appears upon the informations, and the affidavits for mitigation, to be of a very high nature; for here are three justices, who are intrusted by the act of parliament of the 5. & 6. Edw 6. c. 25. with a discretionary power to grant or refuse licences to the persons who apply for them (b), for each of which the statute allows one shilling. It appears there were several applications made for licences, and that the justices granted them to anybody that was willing to pay ten shillings, without any regard to the person, whether he was qualified within the intent of the act or not (c). There was indeed a distinction made between townsmen and foreigners, the latter being obliged to pay much more than the former; and there is no doubt but that by the by-laws of a corporation, in a great many instances, foreigners may be obliged to pay greater fees than the townsmen, as for the setting up of any trade, &c. but selling of ale is not a trade, or the subject matter of any by-law. Licensing public-houses is a trust reposed in justices of the peace by the Legislature, and when they execute it in this extraordinary manner, neither the custom of doing it for twenty-five years before, nor the application of the money to public purposes, nor the consent of the other ruling members of the borough, can excuse these justices from the censures of this Court.

Therefore the three justices must be fined one hundred pounds each, and *Seymour*, who appears to be an agent or instrument to the justices, must be fined one hundred and twenty pounds, viz. the sum of forty pounds on each information.

The justices and *Seymour* had in court all the fine money, except one hundred pounds, which they offered to pay;

But THE COURT said, Let them be gentlemen of ever so large a fortune, they must pay the whole fine in court or be committed, and checked one of the clerks in court for proposing to undertake for the payment of the one hundred pounds. The justices then paid the three hundred and twenty pounds, and gave their note for the remaining one hundred pounds, which was accepted by the Court as payment.

(a) See Anonymous, ante, 85. and (c) See *Rex v. Filwood*, 2. Term Rep. 145. and *Rex v. Holland*, 1. Term Rep. 228.

(b) See now the statute . Geo. 2. Rep. 652.

The Case of the Lieutenancy of London ;

Case 327.

OR,

The King against Evindon.

LEE, Chief Justice, delivered the opinion of the Court upon the case, after several arguments at the bar, in the following manner: This is a motion for a writ of privilege to be granted to the militia:—What shall be considered a personal service?—S. C. 2. Stra. 1143.

C c 2

Mr.

THE CASE OF
THE LIEUTENANCY OF
LONDON; OR,
THE KING
against
EVINDON.

Mr. Evindon, an attorney of this court, and a housekeeper in the city of *London*, to exempt him from serving in the city militia. This motion is grounded upon a summons from the commissioners of the Lieutenancy there, by which *Mr. Evindon* is required to provide arms, and to appear along with the rest of the city militia, to be reviewed and to exercise, &c. Upon our granting a rule to shew cause why this writ of privilege should not issue, two objections were started; the one, that the service required in the militia is not properly a personal service; the other, admitting it to be a personal service, that it is not so necessarily personal but that it may be served by deputy. As to the former objection, it appears in the first place from the summons itself, that the service is personal, for it requires *Mr. Evindon* to appear personally, in arms, to be mustered along with the rest of the militia, &c. But to support this objection, mention was made at the Bar of several very ancient commissions of array, in which this service was not considered as personal; for that by them whole counties, and particular men of great interest and fortunes were compelled to raise a certain number of men without being obliged to be soldiers themselves. This we allow to have been sometimes the case before the statute of 25. *Edw. 3. c. 8.* but by that statute it is enacted, "that no man shall be constrained to find men of arms other than those which hold by such service, if it be not by common assent of parliament." This act was made to prevent the Crown forcing men to find soldiers, who were not obliged by any service or act of parliament to do it. And it appears by the preamble to the statute 4. & 5. *Pb. & Mar. c. 3.* that this service is personal, for it takes notice that the men to be raised are to be the most able men; and it was to prevent the releasing of such men, and the taking in their room people of less strength, that this statute was made. As to the statute 13. & 14. *Car. 2. c. 3.* which was made for ordering the forces in the counties at large, how far that has made such service in the militia not to be personal, people's properties and fortunes being charged and not their persons, we think foreign to the present question; for in the same act of parliament there is a special proviso, by which the city of *London* is to raise its forces as in former times (a), notwithstanding that statute, and therefore this service is to be considered as personal; and then there can be no room to doubt but that attorneys are, by the common custom of the realm, exempted from it, because they cannot attend the field and the court at the same time; and this reason is given in the recitals of these writs of privilege which have been granted; viz. because of the oath by which they are bound to serve the king and his people in the courts of justice, pursuant to the rights which the king and the subject have in their service as attorneys of this court; and the authorities where attorneys have been excused in instances that require personal attendance are, 1. *Vent. 16. 29.* and *Prowse's Case (b)*.

As to the other objection, it is not so certain that deputies will do in a duty of this nature, and if there were times of danger, it

(a) See the Statute.

(b) Cro. Car. 389.

would be no easy matter to get a representative, in which case a man must be compelled to serve himself; but supposing deputies will do, yet even that, in our opinions, will not make any alteration. The case in *March's Rep.* 30. in which the following distinction is taken, viz. that in a personal service an attorney shall not be constrained to act, but if it can be served by deputy he shall not be excused, appears to be the same case with that in 2. *Roll. Abr.* 272. pl. . It does not appear in *March* by whom it was said, that an attorney shall not be privileged from an office which may be served by deputy; but in *Roll's Abridgment* notice is taken that it was said by Justice JONES only: but, notwithstanding this case, there is an authority of a subsequent date that an attorney shall be excused from offices, though they may be served by deputy. 1. *Lev.* 265, 266.; for though a deputy may do, yet the principal shall be answerable for his misbehaviour. And the case in *Cro. Car.* 11. is in point to the present case, for there a writ of privilege was signed by all the Justices of the common pleas to free one Venables, a clerk under the *Custos Brevium*, from being a soldier; and the writ recites, that it is the immemorial custom of the Court, that neither attorneys nor clerks of the court shall be pressed for soldiers, nor elected to any office without their consent, for that they ought to attend the service of the court; and there are precedents of such writs of privilege to discharge clerks from being pressed for soldiers in *Co. Ent.* 436. *Officina Bre.* 164. 174.; and in *Queen Anne's* time there was a writ of privilege, signed by Lord Chief Justice HOLT, to one Smith, and another by Lord Chief Justice RAYMOND to one Skinner, both which were to discharge them from serving as militia-men in London. We have had a conference upon this case with the Judges of the court of common pleas, who have been applied to for a like writ of privilege, and who have had the case spoken to before them several times as well as we, and it is the unanimous opinion of both Courts that attorneys are entitled to such writs of privilege.

Therefore this rule for the writ of privilege must be made absolute (a).

(a) See same point, Heaton's Case, Barnes, 42.; but the Militia Acts now allow the person nominated to exempt himself from the obligation of serving, by the payment of ten pounds; and it is settled in Gerrard's Case, that an attor-

ney is not intitled to a writ of privilege to exempt him from serving in the militia, it being no longer deemed a personal service. 2. Bl. Rep. 1123. Mayor of Norwich v. Berry, 4. Burr. 2109.

THE CASE OF
THE LIEUTENANT
NANCY OF
LONDON; OR,
THE KING
against
EVINDON.

The Duchess of Portland against Wynne.

Case 318.

THE DUCHESS OF PORTLAND laid out a considerable sum in repairing sea banks that lay between Mr. Wynne's estate and her's, and then got an order of the commissioners of sewers to charge Mr. Wynne with his contributory share. Mr. Wynne applied to

In what case the Court will refuse to grant a certiorari to commissioners of

sewers.—4. Hawk. P. C. 144. ch. 27. f. 23.

DUCHESS OF
PORTLAND
against
WYNNE.

this court for a *certiorari* to the said commissioners, to move all orders relating to the repair of all sea banks, between the *Duchess of Portland* and himself, and also to the repairing of the east and west marsh sea banks, upon an affidavit, that all the said sea banks were in good repair, and that there could be no danger in removing the said orders. Upon a rule to shew cause, *the Duchess* produced an affidavit, that subsequent to the rule granted the embankings of the east and west marsh sea banks were very much damaged from a very high spring tide.

THE COURT has always been cautious in letting these *certiorari*'s take effect. It is upon this account that the application is always upon affidavit; and then there is a rule to shew cause why they should not go; whereas in other cases they go of course (a). And this rule is granted to the intent that the Court may judge, from what is offered by the other party, whether any inconvenience may follow upon the *certiorari* issuing: and further, upon the return, the *certiorari* is not filed without giving the party another opportunity of laying before the Court his exceptions; for if the orders removed be good, the Court may grant a *procedendo* before filing of them, which they cannot do afterwards (b); and the party also before filing may shew once more whether there may be still any inconvenience that may arise to the properties of people lying upon the same level; for if any real danger should be manifested to the Court, it will not suffer the orders to be filed, for thereby the hands of the commissioners are closed, and there will be a suspension of their jurisdiction until this Court has come to some determination about those orders, although the banks may be in the last danger, and want the interposition of the directors. In June last, it is sworn, that the banks in the rule were in good repair; but subsequent to that it is sworn, that the east and west marsh sea banks were very much damaged by a strong tide. And the rule extends not only to remove the orders of the commissioners between the *Duchess* and *Mr. Wynne*, but also all orders relating to the east and west marsh sea banks, which appear to the Court to be in a very dangerous state.

Therefore we cannot make this rule for a *certiorari* absolute; for, suppose the commissioners upon this general rule had returned only the orders between *the Duchess* and *Mr. Wynne*, and had omitted certifying the orders relating to the east and west marsh sea banks, they would certainly have been in contempt. But if this general rule be withdrawn, we will not scruple to grant a *certiorari* to remove the orders between *the Duchess* and *Mr. Wynne* in regard to this contribution.

Therefore let the rule be discharged.

(a) See the case of the Commissioners of Sewers for Yorkshire, 1. Stra. 609. Fort. 374. 8 Mod. 331.

(b) The writ may be taken off the file

quia improvidi emanavit. 1. Burr. 488. 4. Burr. 2459. 2522. 4. Hawk. P. C. ch. 27. f. 63. *antic.*

Rouse against Patterfon.

IN REPLEVIN, the sheriff returned *averia elongata*; and an action being brought in the common pleas, wherein the plaintiff declared in an action on the case against the said sheriff of *Middlesex* for taking insufficient pledges, the jury gave a verdict for the plaintiff, and found, that the pledges were insufficient both at the time of taking them and afterwards; and judgment was accordingly given for the plaintiff. Whereupon a writ of error being brought in the king's bench, and the general errors assigned,

DENNISON for the plaintiff in error insisted, that an action upon the case will not lie against the sheriff upon the statute of *Westminster the Second*, until a *scire facias* has been first brought against the pledges; for at common law, until the statute of *Marlebridge*, the sheriff could not take pledges by plaint, but only by writ (a); and that appears likewise by the statute itself. The statute of *Westminster the Second* (b) sets forth the duty of sheriffs in taking pledges both to prosecute and for the return of the cattle, and their punishment for the breach of it, namely, that they shall answer *de pretio averiorum*, &c.; and where the sheriff neglects to take pledges, he is punishable by amerciamment (c); and there lies a writ of detinue, wherein the judgment is to recover the thing itself, or the value (d). But the regular method is not to proceed by action, but to sue a *scire facias* against the sheriff; and that is the speedier remedy (e). The pledges required by the statute of *Westminster the Second* are taken for the benefit of him who makes the distress, namely, the avowant, and not of the sheriff; and so it differs from pledges taken by the statute of 23. Hen. 6. upon which no action lies for taking insufficient pledges (f). A *scire facias* must be sued out in this case (g). The case of *Sheers v. Mulso* (h) shews, that pledges are for the security of the avowant, and must be proceeded against in the first instance; for the sheriff is not liable until there appears a default in them. And it is like the case of bail, in which a *scire facias* does not lie against the bail until the default of the principal. The plaintiff must do every act that lies in his power; he must sue out a *capias* against the principal before he can charge the bail, &c. for the recognizance of the bail, that the principal shall render himself, is intended by law to be upon process awarded against him (i). The precedent in *Lilly's Ent.* 37. is a modern thing, and I believe of no authority. Lord Coke (k)

An action on the case lies against the sheriff for taking insufficient pledges in replevin without first suing out a *scire facias* against the pledges (l).

S. C. 1. Viner Abr. 399. S. C. Bull. N. P. 60.

(a) Co. Lit. 146. b. Dyer, 246. pl. 76.

(b) Chap. 2.

(c) 4. Inst. 180. 2. Roll. Abr. 259.

(d) Bro. Abr. "Plevin," pl. 4.

(e) See accordingly Year-Book 2. Hen. 6. pl. 15. a.

(f) 1. Saund. 59.; and see Etherick v. Cowper, 1. Salk. 99. and 1. Will. 223. Cowp. 769.

(g) It is so said in *Theaurus Brevium*, 274.; and *Skin.* 244. 3. Mod. 56. *Raft. Ent.* 569. *Co. Ent.* 637. are cited in support of the assertion.

(h) *Sheers v. Mulso*, Trinity Term, 4. Geo. 1. upon error out of the common pleas. *Fort. Rep.* 330.

(i) *Cro. Eliz.* 397.

(k) 2. Inst. 340.

(l) If the sheriff take insufficient pledges *de retorno habendo*, the Court, on motion, will order him to pay the defendant the damages and costs recovered, *Richards v. Acton*, 2. Black. Rep. 1220. But for neglecting to take a replevin-bond, the party must bring his action, *Rex v. Lewis*, 2. Term Rep. 617; and the sum recovered shall be only to the amount of the distress, *Yea v. Leathbridge*, 4. Term Rep. 443.

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comments upon this statute, and says, that insufficient pledges are as no pledges; which must be understood according to the subject-matter: And here it ought to appear that the pledges are insufficient. *Moyle* (a) has the record and entry of the judgment in the Year-Book of *Henry the Sixth* (b); and *Brooke* (c) abridges that case, and says, that judgment was against the sheriff by default. The case of *Traversey*. *Mickleburn* (d) is recorded at large, with several notes, in *Moyle's Precedents* (e); and the *Officina Brevium* (f) has a like precedent. The case of *Moyser v. Gray* (g) was an action against the Mayor of *Brury* for delivering the cattle without finding any pledges. But though it must be admitted that an action will lie against the sheriff where there are no pledges, yet where there are pledges, their sufficiency is not to be determined upon a collateral action. And it is to as good purpose to sue sufficient pledges as it is to issue a *copias* against the principal, who may perhaps be beyond sea or insolvent, in order to affect the bail. The law supposes that the principal may render himself, or pay the money, or get it paid for him; and it is stronger in a sheriff's case, whom the law always supposes to be a responsible person, and one that may be found at any time; and therefore he, being an officer favoured in law, ought to be the last person against whom the action should be brought.

DRAPER, *Serjeant, contra*. This case depends upon the construction of the statute of *Westminster the Second*, in which there is not one word of a *scire facias* against the pledges; but it is provided, that in this case the sheriff himself shall answer *de pretio averiorum*. If the replevin be by plaint, no *scire facias* can issue upon it; the consequence of which is, that there must be an action, for otherwise the party would be without remedy. There is no difference between a replevin by writ and a replevin by plaint. It is laid down in 2. *Inst.* 340. that if the sheriff return insufficient pledges, they are no pledges within the statute, and that, in such case, the sheriff shall be charged by this act as if he had taken no pledges at all. *Detinue* cannot lie *de pretio averiorum*, &c. But where the statute lays of the sheriff "*respondeat ipse de pretio averiorum*," those words are sufficient to give an action; as in the statute of *Winchester*, of *HUE AND CRY*, which says, "the county shall answer, &c." An action has been brought against the sheriff not only for not taking pledges (i), but for not taking sufficient pledges (k); and no mention is made in either of the cases of a *scire facias*. Where an affirmative statute gives a remedy, and does not say that there shall be no other, the common law, in the case which has been put of bail, affords a remedy. So if the party be damaged by the sheriff's neglect, the common law will give him a remedy;

(a) *Moyle's Precedents*, 58. title
"Scire Facias."

(b) 2. *Hist.* 6. pl. 15.

(c) *Brō. Abr.* title "Pledges."—See
also *Fitz. N. B.* 74.

(d) *Hutt.* 77.

(e) *Moyle's Prec.* 166.

(f) *Officina Brev.* 243.

(g) *Cro. Car.* 446. S. C. *Jones*, 378.

(h) 2. *Inst.* 340.

(i) *Brownl. Red.* 25.

(k) *Lilly Ent.* 37.

though

though it is insisted, that the statute of 23. Hen. 6. does not come up to this case, because here the pledges are only for the avowant's security, whereas they are both for the party's and sheriff's security. And actions have been brought against the sheriff that he may answer *de pretio averiorum* (a). But if it were an action on the case, yet it would lie. And an action upon the statute of HUE AND CRY has been called an action upon the case.

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LEE, Chief Justice. This is a hard case upon the state of it. The consideration is, Whether, upon the foundation of law, in an action on the case upon this statute, there is not sufficient reason to maintain this action as it is brought? The plaintiff's declaration has set forth the whole proceeding; and upon the return "*eloined*," the action is brought against the sheriff for taking *insufficient pledges*. The statute of *Westminster the Second* intends pledges for the security of the distrainer, according to *Cro. Car.* 446. and *Jones*, 378. which is the same case. If the sheriff take no pledges at all, an action on the case lies against him; there is no case to the contrary since 2. *Inst.* 340. and insufficient pledges are no pledges. MR. DENNISON has ingeniously endeavoured to distinguish between the sheriff's taking insufficient pledges and his taking none at all; but 2. *Inst.* 340. is expressly, that they are the same thing. Precedents have been cited in this case, but no determinations to warrant that the pledges must be proceeded against first; and therefore, though the party may proceed against the pledges at first, yet if the sheriff take insufficient pledges they are as none, and it is a direct breach of the statute. This is different from the case to which it has been compared in *scire facias* against bail, which depends upon the terms of the recognizance, and the construction which the Court makes upon it in favour of the bail. Therefore, as at present advised, I think, upon the case in 2. *Inst.* 340. and *Cro. Car.* 446. there being no authority to the contrary, that this action does very properly lie upon the statute of *Westminster the Second* without first suing a *withernam* or *scire facias* against the pledges.

PAGE, Justice. I am clearly of the same opinion; and the Court was of this opinion upon the former argument, if my notes are true, &c.

PROBYN, Justice, was absent, on account of the bad state of his health.

CHAPPLE, Justice. I remember several cases of this nature upon a *scire facias* in the common pleas. It has been held in the latter cases, that no action lies against the sheriff for taking but one bail, or for putting in insufficient bail. I should be glad, therefore, to look a little further into this matter, and to consider whether this action is maintainable or not; for if, by another kind of proceeding, the very cattle can be returned, no action can lie against any one.

(a) March, 46. *Cro. Car.* 594.

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LEE, *Chief Justice*. Let this case stand over then, and we will consider of it.

It was argued again in *Hilary Term* 1739 as follows:

WYNNE, *Serjeant*, for the plaintiff in error, insisted upon two points: FIRST, That an action on the case will not lie, because this question arises upon two points upon the statute of *Westminster the Second*, c. 2. which was a new provision, and not at common law; for the statute of *Marlebridge* (a), which gives replevin, does not oblige the sheriff to take pledges; but at common law they were to be taken, that the king might be answered for the amercia-ment (b). And this statute does not give an action on the case; for though it is an affirmative statute, yet being a new provision it implies a negative (c). And there is no express resolution that an action on the case will lie upon this statute, but the action ought to be detinue, or *scire facias* (d). And upon such action the goods are to be restored, if possible; if not, *ad valorem*.

SECONDLY, The party has not done what was necessary to in-
title himself to this action, for he ought first to have sued a *scire facias* against the pledges, and not brought an action on the case against the sheriff in the first instance. According to 2. *Inst.* 340. if, upon the writ to have return of the beasts from the pledges, the sheriff returns "*nihil*," then the plaintiff may have a *scire facias* against the sheriff *quod reddat ei tot averia* or *tot catalla* (e). By the statute of *Westminster the Second*, if the sheriff take insufficient pledges, or none, the party shall, upon a *scire facias*, have *tot catalla*, &c. So he shall against the bailiffs of a franchise. But none of these cases so much as mention an action on the case. The *Officina Brevium*, 243. sets forth the form of the *scire facias*, and proceedings in replevin agreeable thereto. In *Officina Brevium*, 305. no pledges were taken. In *Denington v. Edwin* (f), the pledges were proceeded against first. The sheriff is remediless against the avowant and the pledges; and on the other hand it is but reasonable, that the pledges should have an opportunity of pleading. They may plead in abatement; they may plead a tender, refusal, &c. *Co. Ent.* 637. *Skin.* 214.; which is warranted by the reason of the law in other cases, *Gro. Car.* 295. So that in this action the sheriff is chargeable with damages and costs without remedy over, whereas in a *scire facias* he is not chargeable with damages, *Br. Damages*, pl. 3. And as this act of parliament, though four hundred and sixty years old, has never yet produced an action on the case, it is strongly to be presumed that no such action will lie. *Litt. sect.* 108.

MR. HOLLINGS for the defendant in error. The declaration charges, that the pledges were insufficient at the time of the taking, and are so ever since, &c. The cases which say a *scire facias* lies

(a) 2 *Inst.* 139.

(d) *Bro. Abr.* "Detinue," pl. 6.

(b) 4. *Inst.* 180. and per HOLT, *Dalton's Sheriff*, 272. 433.

Chief Justice, in *Roberts v. Savile*,
5. *Mod.* 408.

(e) *Bro. Abr.* "Scire Facias," 3.

(c) *Hob.* 298. *Plowd.* 113. 206.

(f) 3. *Mod.* 56.

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against the sheriff do not say that an action on the case will not lie. Where the replevin was by plaint, no *scire facias* lay (a); and therefore an action on the case must have lain, that the party might not be without the remedy. That the party may bring *detinue*, or that *detinue* used to be the action, is no argument that an action on the case will not lie; for actions on the case are often brought now where anciently another kind of action was used: as an *affize* of nuisance is now changed to an action of trespass, &c.; and at the time of making the statute of *Westminster the Second* actions on the case were not in frequent use, as they are now. Besides, it has been adjudged that this action lies. In *Moyser's Case* (b) it is held by the whole Court, that it is at the sheriff's peril to take sufficient pledges; and an action on the case will lie where he takes no pledges (c). Upon the former argument it was admitted, that an action on the case would lie; only it was objected, that a *scire facias* ought to be first brought; but in this case it would be to no purpose to bring a *scire facias* against pledges who have been found to be insufficient continually, &c. There is no difference between insufficient pledges who have been found insufficient, and no pledges at all; for if the sheriff return insufficient pledges, they are no pledges within this statute. And in such case the sheriff shall be charged by this act as if he had taken no pledges at all. It is no objection to this action that it makes the sheriff liable to damages, for otherwise how could the party be answered *de pretio averisurum*. In the case of *Asper v. Busnell* (d), an action was brought for taking the plaintiff's pheasants; and the Court intended them to be dead pheasants to support a verdict. An action was brought (e) for taking the plaintiff's fishes *separali piscaria*; and the Court intended it to be a stewpond, because after a verdict the Court will admit any intendment to support it. In the case of *Baule v. Knight* (f), a policy of insurance omitted the time when the risque was to begin; and though that case was adjourned, yet the Court said, that everything ought to be intended to support the verdict. As to what the pledges might have pleaded, as tender, &c. the sheriff might have taken advantage of that himself, &c.

LEE, Chief Justice. Upon this argument there are two exceptions taken: FIRST, That an action on the case will not lie; or, SECONDLY, That a *scire facias* ought to have been first brought. This case depends upon the statute of *Westminster the Second*, which directs all such officers to take sufficient pledges, and says, "*quod si quis alio modo pleges ceperit. respondeat ipso de pretio averisurum*." As to pledges at common law, they were only to render the sheriff amenable, that he might be amerced. And as to the objection that an action on the case does not lie, it is only said in the Books, that either *scire facias* or *detinue* may be brought

(a) 2. Inst. 340.

(b) Cro. Car. 594. 2. Roll. Abr.

259.

(c) Cro. Car. 446. S. C. W. Jones,

378.

(d) Ray. 16.

(e) 1. Vent. 122.

(f) Easter Term, 4. Geo. 2.

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against the sheriff; but in the case that has been cited from *Cro. Car.* 446. and that is the only one, an action on the case was brought for taking insufficient pledges; and there the Court took it for granted that an action on the case lay; but the question was, Whether taking money was as well as pledges? and they held that it was not, because the party may have a *scire facias* against the pledges; but it is not to be inferred from hence that no other action may be brought. No pledges and insufficient pledges are said to be the same thing in 2. *Inst.* 340. which I understand to be meant as to the sheriff's obedience to the act; and therefore I do not see but that there is a sufficient foundation to hold that an action on the case will lie. As to THE OTHER POINT, There is no doubt but *detinue* will lie against the sheriff. But as no case has determined that an action on the case will not lie, and my Lord Coke holds that insufficient pledges are none, it should seem that this action is properly brought. I do not see that this case would be helped by the verdict, if that assistance were necessary; for there would need no proof before the jury of a *scire facias*, but only of the fact of the pledges' insufficiency. As to damages, the statute expressly gives a remedy for the cattle, or *de pretio overiorum*, &c. In the 4. Hen. 6. 16. b. it was a question, Whether an action would lie against an executor for a *devastavit* returned? and BABINGTON, Justice, compares it to a sheriff's case, &c. wherein, he says, it is usual to have a *scire facias* against the pledges, or an action may be brought against the sheriff upon suggestion of the matter; which I take to be the present case. And therefore, as at present advised, seeing no case for it, I know no reason to shew so great favour to a delinquent sheriff. But as I do not desire to rest this upon my opinion, if my Brothers have any doubt, I shall be glad to consider further of it.

PAGE, Justice. Upon the former argument I was of opinion that the action was well brought, nor do I see any reason to alter my opinion. An action on the case lay against the sheriff before the statute, and the act takes away no remedy; and therefore I agree with MY LORD.

PROBYN, Justice. I am of the same opinion, and incline to think, that this action does lie. That it lies where no bail at all was taken, is warranted by *Cro. Car.*; and my Lord Coke says, that insufficient bail is the same thing. Actions on the case were but seldom used formerly; and it is for that reason that this act seems to point at the remedy that was then most in use.

CHAPPLE, Justice. I am of the same opinion. It should seem to me not to be necessary to have a *scire facias* against the pledges to entitle the party to his action against the sheriff. In the case of an action against the indorser of a bill of exchange, it has been determined, that it need not be alledged in the declaration

tion that there has been any default in the drawer (a). In *Latch*, 159. there was an action on the case for not taking pledges, &c. and *Comb.* 228. appoints a better way than taking pledges.

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LEE, Chief Justice. The judgment must be affirmed.

(a) *Branley v. Fraser*, 1. Stra. 441. *Sidebotham v. Smith*, 1. Stra. 649. *Lawrance v. Jacob*, 1. Stra. 515. *Lake v. Hayes*, 1. Atk. 281. But on a *provisory note* a demand in such case must appear to have been made on the drawer, *Oakes, Ld. Ray.* 443. *Collins v. Baker*, 2. Stra. 1083. *Prado v. Fuller*, Comy. Rep. 579. *Heylin v. Adamson*, 2. Burr. 669. *Lambert v. Oakes*, Ld. Ray. 443.

The King against Sparrow and Others.

Case 330.

AMANDAMUS was directed to the defendants, being bailiffs of Ipswich, and as such acting as justices of the peace there, commanding them to appoint two or more overseers of the poor of the said place, or to shew cause to the contrary, &c.

Mandamus dated the thirteenth of June, commanding the justices to appoint overseers, is good, although by the 43. *Eliza* c. 2. they are to be appointed within a month after *Easter*, and *Easter Day* in that year was on the twenty-second of April.

The defendants returned, that they had appointed three substantial householders therein mentioned, according to the statute, as by the said writ they were commanded. The writ of *mandamus*, in this cause, bore *teste* the thirteenth of June, and *Easter* was on the twenty-second of April in the same year.

S. C. 2. Stra. 1123.
S. C. 2. Sess. Caf. 184. 140.
S. C. 1. Const. 17. pl. 23.

MR. SOLICITOR GENERAL moved, that the writ of *mandamus* and the return might be quashed, as not being made pursuant to the statute, which appoints overseers of the poor to be nominated "in *Easter week*, or within one month after *Easter*;" and as this appointment was made without the month after *Easter*, the writ of *mandamus* is *felo de se*, and ought to be quashed. This Court will take notice of the Calendar, which is part of the law, and has been so determined over and over (a). In the case of *Hoile v. Lord Cornwallis* (b) the Court judicially took notice that the fifteenth of June was on a Sunday, and held that the Calendar was part of the law of the land. The common law knows no such officer as an overseer of the poor merely as such; the churchwarden was overseer *ex officio*; and therefore, as it is an office created by statute, the statute must be complied with; as where this statute requires the overseer to be a substantial householder, he must be such, or else he is incapable of the office; and it has been often determined so (c). This is not like the case where a court leet may be held at other times than limited, which is at common law. If the month is to be pretermitted, the consequence is, that the churchwardens will be overseers in the mean time. There is a penalty for not complying with the time in the act, and it is no defence to an action brought for it, that they obeyed the act after the time; and the

(a) See the case of *Harvey v. Broad*, 1. Salk. 626. 6. Mod. 41. 31. 148. 160. 252.

(b) *Hoile v. Lord Cornwallis*, Trinity Term, 6. Geo. 1. 1. Stra. 387.

(c) See 1. Const's Poor Laws, 1 to 5. where all the cases respecting the form and manner of appointing overseers are collected and arranged.

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making a penalty, shews that the legislature intended that they should not exceed the time limited in the act. If one month is to be omitted, another month may be omitted, and so on for ever. If the justices cannot exercise their authority after the time appointed by the act, a *mandamus* of this Court, which is only to enforce an authority, will not give them a power to appoint the overseers after the time. Numbers of orders have been quashed only because the sessions were not held within the proper time (a). Here the statute gives the justices an alternative; the appointment of overseers may be either at one week or another, viz. either in *Easter* week or a month after. But where a statute creates an offence, it must be strictly pursued, and affirmative directions imply a negative that they shall not be exceeded. And therefore the *mandamus* being after the proper time, the writ and return ought to be quashed; for it should have been moved for within the month, which is the proper time.

MR. HOLLINGS *contra*. The 43. *Eliz.* c. 2. gives the justices a power to appoint overseers, but that does not create any new power, because the justices had such a jurisdiction at common law; and the time, in this case, is only directory: when the time in the statute is elapsed, there is no pretence to say the time is infinite, because the Court can grant a *mandamus*. The power of the justices continues the whole year, and there are no negative words in the statute, as, "at no time after," or the like; so that they are not strictly tied up to time. They may bind apprentices for a less time than that mentioned in the fifth section of this statute, which has been held to be only directory (b): and, according to my LORD COKE, one part of a statute must be expounded by another. A quarter sessions may quash a rate made by the churchwardens and make a new one (c). Where the statute of 18. *Eliz.* c. 3. appoints that the orders concerning bastards shall be made by the justices "in, or next to, the limits of the parish where such child was born," that has been held to be only directory (d). It has been held that a parish that is parcel of a rectory is within the statute 43. *Eliz.* c. 2. and shall have overseers, &c. (e). According to *Plowden*, in explaining acts of parliament the words are FIRST to be considered, and SECONDLY the sense; and where a doubt arises, it is to be considered what answer the makers of the statute would have given to such a question. The words "void and null" in statutes have been often held only to mean voidable; so though the 1. *Jac.* 1. c. 17. orders that notice shall be given in writing, yet notice has, in some cases, been held good though not in writing. Suppose the justices had appointed overseers,

(a) *St. Michael Cornhill v. St. Michael Ipswich*, Easter Term, 2. *Geo.* 2. *Rex v. Fisher*, 2. *Stra.* 865.

(b) *Rex v. Morris*,

(c) *Rex p. St. Leonard, Shoreditch*, 2. *Salk.* 483. *S. C. Holt*, 503. But the sessions cannot make an original rate,

Rex v. Aberford, 2. *Ld. Ray.* 798. See also, as to the power of the sessions on this subject, *Dougl.* 562. *Cald.* 105. 1. *Term Rep.* 615. 2. *Term Rep.* 623. 3. *Term Rep.* 480.

(d) 2. *Salk.* 473.

(e) *Cro. Car.* 92. 394.

and

and they had died the last day of the month, could no appointment be made after? Suppose the justices make a wrong appointment, cannot a good one be made afterwards, if in the mean while the time should elapse? If not, great inconveniences must follow: and therefore the *mandamus* and return ought to be allowed.

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LEE, *Chief Justice*. This is a case of a good deal of consequence, and I know of no determinations that have adjudged this statute to be only directory, except in that clause which relates to the binding of apprentices by the justices, which is held to be directory in the case of *The King v. Morris*, cited by Mr. HOLLINGS. The Court must take notice of the Calendar (a). There may be a difference between an officer at common law, and a new officer who is made by statute; for whether this Court can construe the power of such new-created officer in other terms than the statute has limited it, is what I am doubtful of. In the construction of charters the rule is, that every affirmative clause implies a negative; though in *Hicks' Case* (b) it was held only directory; but the reason was, that there was impliedly an incidental power in the corporation to elect, &c. In this case the statute orders the election to be yearly; and the intention of the statute is certainly that it should be so by imposing a penalty. In the case of *The King v. Truro*, by the name of *Prowse v. Foot* (c), the words of the charter were "*annuatim eligent, &c.*" and the meaning was held to be, that the office should be annual, and expire at the end of the year; but the contrary was held in the exchequer, and afterwards in the lords, and that it was but directory. Upon the statute of the 23. Hen. 6. c. 15. s. 2. of Elections, my LORD COKE holds, that the time must be observed, and says (d), that no election can be made of any knight of the shire but between the hours of eight and eleven in the forenoon, but if the election is begun within that time it may be continued on after it; and therefore, considering what may be the consequences arising upon this case, I think it is proper to consider further of it. If the justices had not a power to appoint after the time is passed, to be sure the *mandamus* will be *felo de se*.

PAGE, *Justice*. I am of opinion that this is only directory in the statute; for if the officers hold over, is the statute to expire and be useless, and are no new overseers to be chosen? or suppose they die, Are overseers never to be chosen in their stead, because the time is expired? The act punishes the justices for exceeding the time, but does not take away their power of appointing overseers.

PROBYN, *Justice*. The difficulty with me is, that here is a new authority; and it is a rule, that in such case it must be strictly pursued. If the overseer should die, there would be a necessity for choosing another, and then the Court might carry the law into execution for the necessity of it. It seems to me, that the cause

(a) 6. Mod. 41. 81. 143.

(b) Roll. Abr. "Corporation."

(c) 3. Brown's Cases in Parl. 167.

(d) 4. Inst. 48.

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ought to be pursued strictly according to the statute that created it; and the penalty shews that to be the intention of the Legislature. The Court has held the clause in the statute for the binding of apprentices for seven years to be directory; not that it is strictly according to the statute, but because it is the act of the party himself. I would consider further of this cause.

CHAPPLE, *Justice*. An explanatory act must be taken literally and not by intendment; for it would be incongruous for an explanatory act to need an explanation. According to 2. *Inst.* 71. leets shall be held twice a-year, but that is to be according to the accustomed time and place, which shews the statute to be declarative. It is held in 2. *Salk.* 487. that extraparochial places are omitted out of this statute, and persons there must subsist upon private charity, as all poor did at common law before this statute. The beginning of this statute requires the justices to be of the *quorum*; and the words "said justices" relate thereto through the whole act: if the makers of this act were to be asked what the words "so to be nominated" shall relate to; what answer would be given; but that they should relate to the time before mentioned in the statute. But, as this case may be of great consequence, I shall give no positive opinion at present.

LEE, *Chief Justice*. Let it stand over for further consideration.

It was afterwards, in the same Term, argued as follows, by the name of *The King v. Fonnereau and Others*.

Upon arguing again the rule to shew cause why the writ of *mandamus* and return should not be quashed, &c. the question was; Whether overseers of the poor can be appointed after the time limited by the statute 43. *Eliz. c. 2.* has expired?

MR. HOLLINGS insisted that they might; for though I do admit that the *mandamus* cannot give a right where there is none, yet here the justices have a proper jurisdiction. The 8. & 9. *Will. 3. c. 30.* impowers the justices upon an appeal to the sessions to allow costs; and therefore a *mandamus* to allow costs at another sessions was quashed, in *Michaelmas Term*, in the fifth year of *George the Second*, because the subsequent sessions had no jurisdiction to give costs, by the act. So where an appeal is given to the next sessions, if the party let it lapse he is barred (a). But there is a difference between not electing a mayor within the time prescribed by the charter, as in *King v. Pool* (b), and where an act of parliament appoints officers to be chosen within a certain time, which would be frustrated if the time being elapsed would make an appointment void. The case in 4. *Inst.* 48. which was to prevent the elections of members in parliament from being held at unreasonable times, is different from

(a) See Mr. Const's Poor Laws, 1 vol. 231. 236. 239. 247.

(b) 7. Geo. 2. Annally, 23. 47. 2. Bat. K. B. 93. 447. Cunn. 11.

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this case. Statutes of public conveniency are to be equitably expounded. The statute 9. *Edw.* 3. c. 2. extends to administrators, though executors only are named in it; and a case was held to be within the equity of the statute 4. *Hen.* 4. though not within the express words of it (a). So although the statute of *Gloucester*, 6. *Edw.* 1. c. 5. give an action of waste only against a tenant for life or years, it is held to extend to a tenant for but one year, &c. The statute 43. *Eliz.* c. 2. was made for the benefit of the poor, who ought not to suffer for the justices neglect; and PRATT, Chief Justice, and RAYMOND, Justice, were of opinion, that upon the justices neglect an appointment might be made after the time, because the parish ought not to suffer for their fault; and there is a necessity that overseers of the poor should be appointed. This question is not whether the justices, by appointing after the time, have avoided the penalty of the statute, but whether such appointment is an absolute nullity and void; if so, it would be in the power of the justices never to appoint overseers; for who can compel them to execute their authority within the time mentioned? The Court will not grant a *mandamus* within the time, for there is then no neglect; and the Court will not presume that they will neglect to appoint within the time. Suppose the quarter-sessions after the time should quash an appointment, as they may, and order a new one, could not a new appointment be made? And if they could obey such an order, why not obey a *mandamus* of this Court? The statute 2. *Hen.* 5. c. 4. and other statutes direct the quarter-sessions to be held at such certain times, &c. and yet according to 2. *Hale's H. Pl. Cr.* 49, 50. the quarter-sessions are held at various times, &c. the statute being only directory and in the affirmative. Wherefore the rule ought to be discharged.

SIR THOMAS ABNEY *contra*. The case cited from Sir Matthew Hale cannot be law, for since that there have been many hundreds of cases where the orders of sessions not being held *intra mensem*, have been quashed.

LEE, Chief Justice. There have been the sayings of LORD PRATT and LORD RAYMOND upon the subject, but no judgments. I have no objection, if you desire it, to let the question stand for further argument.

Afterwards in *Hilary Term* 1739, in the thirteenth of *George the Second*, IT WAS RESOLVED BY THE WHOLE COURT that the appointment was good.

(a) Plowd. 467.

The King against Crofts.

Case 331.

THE DEFENDANT was convicted by the name and addition of A *ferre covert* Mary Crofts, dealer in spirituous liquors, and wife of John Crofts, victualler, &c. for that she of her own voluntary act sold gin, contrary to the statute 9. *Geo.* 2. c. 23. &c. may be convicted on the 9. Geo. 2. c. 23. for selling gin, without making her husband a party.—S. C. 2. Stra. 1120.

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BOOTLE, *Serjeant*, took an exception, that the defendant's husband was no party to the conviction, as he ought to have been; for it shall be presumed that she sold the gin for the benefit of the husband; and the punishment being pecuniary and not corporal, she cannot comply with the penalty designed by the act. If a wife do an illegal act in selling anything, it is for her husband's benefit, and therefore he must be made a party to the indictment (a).

MR. SOLICITOR GENERAL *contra*. There have been a great number of *femes covert*s convicted upon this act, and upon non-payment of the penalty have undergone the discipline of a house of correction. The law indulges a woman only where she commits an offence or theft in company with her husband, but not where she does it by his command, unless he is actually in her company. This has been held in a great number of cases (b). It is said, that where a wife can offend alone, the husband shall not be included; and the defendant's being called "the wife of John Crofts, victualler," does not imply her husband's coercion. She was summoned, &c. and the Court will not intend that she was convicted by the justices without being admitted to make a full defence. The words of the conviction are, that she did it voluntarily, which excludes the presumption of the husband's coercion. In the case cited by MR. BOOTLE, no judgment was given; and it is blindly and lamely reported. If the wife be indicted for a scold, the husband need not be a party (c). A married woman may be indicted alone for a forcible entry. If the wife sell gin and the husband will not pay the penalty, must he go to *Bridewell* for his wife? So that in this case there is a corporal as well as a pecuniary punishment.

LEE, *Chief Justice*. There is no doubt but that the words of the statute are sufficient to include the defendant; for the words are very general. The defendant must be considered as a person who had sold spirituous liquors. The objection is, that the defendant being a married woman, the husband ought to be joined. I do not know of any case where there is a prosecution against a *feme covert* for a crime upon the breach of an act, for which there is a pecuniary penalty inflicted, and for default of payment corporal punishment, that the husband is liable. Suppose she was compelled by her husband, it is his act, and he is liable to the penalty of the statute, and that would have been the wife's defence before the justice. There are several cases like this upon the statute 1. *Eliz.* that subjects a person to a penalty for not going to church, whereupon a wife may be proceeded against alone; *Forster's Case* (d), *Dr. Hufsey's Case* (e).

(a) Keb. 634. King v. Jordan, 1. Sid. 410. King v. Venner, 2. Keb. 468. 479.

(b) Lord Coke, 3. Inst. and in Hale's H. Pl. Cr. small edition, 65. and transcribed into Hawk. Pl. Cr. vol. 1. p. 3.

(c) 6. Mod. 213. 239. Hawk. Pl. Cr. vol. 1. p. 147.

(d) 11. Co. 56. 2. Bullst. 314. 1. Roll. Rep. 81.

(e) Hob. 56.

Though it is said that a *feme covert* cannot pay damages, and *Lex non cogit ad impossibilia*, and *Impotentia excusat legem*, yet as she is as capable of forbearing the crime forbidden as a man, those maxims do not extend to this case, according to the reasoning in *Hussey's Case*. The cases in *Siderfin* and *Keble* are no determinations at all, and the authorities in *Coke* and *Hobart* govern this case. If the husband be no party to the crime, it would be an odd construction to make him a party to the conviction:

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PAGE, *Justice*. A *feme covert* was indicted alone for keeping a disorderly house in *Essex-street*; and though it was objected that the husband ought to be a party, because of his power over her, yet as it did not appear to be by her husband's coercion, it was held in the case of *The King v. Dixon (a)*, in LORD HOLT's time, that she was indictable alone. And as this conviction is said to be upon the wife's voluntary act of selling the gin, it can never be intended to have been by the command of the husband.

PROBYN, *Justice*, *absente propter aegritudinem*.

CHAPPLE, *Justice*. The case of *The King v. Jordan (b)* is unsupported by any authority of the like nature, and seems to be upon a compromise; for the judgment was stayed, and no judgment given in that matter. In the case of *The King v. Venner (c)* the wife was named "*Spinster, alias Diet*," and no judgment that the wife was not liable, but that she might not be guilty of converting. So that neither of these cases are of authority to lead the Court in this question. The question seems to be, Whether the offence be of such a nature as a married woman may be guilty of? Though the advantage of a contract is the husband's, yet it was the intent of the act to prevent the selling of spirituous liquors in private places, to the detriment of the revenue, and the increase of immorality. The wife may be indicted for keeping a bawdy-house (*d*). It does not appear but that she might not be a married woman at the time of selling the gin, but only at the time of the conviction; for her character as a wife is appended only by way of addition. The penalty cannot be recovered against the husband by making him party; but the wife in this case may suffer the corporal punishment without making the husband a party; though upon the wife's recusancy, the husband's lands in her right are liable (*e*). The utility of the statute would be lost, if married women might by this means escape the penalty of it.

PAGE, *Justice*. According to *Sir Edward Coke*, a married woman may be imprisoned for not taking the oath (*f*).

(a) 10. Mod. 339.

(b) 2. Keb. 634. 2. Leon. 34.

(c) Sid. 410.

(d) 1. Salk. 384. 1. Hawk. P. C. ch. 1. f.

(e) Cro. Jac. 482.

(f) See also *Rex v. Ellen Taylor*,

Easter Term, 5. Geo. 3. where a married woman was committed to the house of correction for not performing an order for the maintenance of a bastard-child had before marriage, and held good. 3. Burr. 1679.

Case 332.

The King against Jenour.

An information granted against the defendant for a libel against the *East India Company*, although the imputation was in the singular number, viz.

"WHEREAS
"an *East India*
"director has
"raised, &c."

S. C. 2. Barnes,
383.

MR. SOLICITOR GENERAL and MR. BROWN moved for an information against the defendant for printing and publishing a libel against THE EAST INDIA COMPANY, in an advertisement in a paper called *The Daily Advertiser*, dated *October* the eighth, 1739, No. 2717, in the words following: "WHEREAS an *East India* Director has raised the price of green-tea to an extravagant rate, the same gentleman being also concerned with the *Swedish East India Company*, the *English* proprietors hope he will find some measure to raise bohea-tea in *Sweden*, that the Company may have an opportunity to ship off some of their bad bohea-tea, instead of having it burnt as usual." And upon a rule to shew cause why an information should not go against the defendant for printing and publishing a libel against the Directors of the *East India Company*;

MR. HOLLINGS for the defendant insisted, that an information ought not to be granted in this case. The rule calls this "a libel against the *East India Company*," and I believe none but a Company would have made such an application as this. The libel is only against one *East India* Director; is that a libel against all the Directors? One Director can never be said to include the whole, though the whole includes all the parts. Every particular Director may as well move for an information as the Company; and so twenty-four informations may as well be moved for as one. The act of parliament which restrains this Company from being concerned with foreign *East India Companies*, and obliges the Directors to take an oath accordingly, will not affect this question; for by charging one man with perjury, &c. fourteen, or any other number, can never be charged. Suppose a person was to say, "a certain Counsellor has been guilty of felony," could the whole Bar move for an information? A paper called "*The Flying Post*" had an article concerning "a notable lawyer," and the word "*not*" was printed in italicks; SERJEANT NOTT took it upon himself, and accordingly an information was granted upon his motion, but not at the instance of the Bar. And he concluded that this rule ought to be discharged, with costs.

MR. ATTORNEY GENERAL, MR. SOLICITOR GENERAL, MR. BROWN, PHILMER, and DENNISON contra. As this libel is meant against one Director, it is no defence to say that it is not a slander against all. The defendant ought to point out who that false brother is. The public, in the mean while, apply this libel against the Company. It is not like saying "a certain Counsellor, &c." for this is a select Company. It is a charge of an offence which the laws have made very penal; and it would be very inconvenient, if where there are a few persons incorporated, a libel may be made against any one at random, which is a libel against all; for the public will fix it upon the one or the other according to their conjectures, which

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which makes it a libel against all the Directors, as it casts a slander upon the whole Company. It is like the case where a person throws a stone over a wall, &c. which does mischief, whether he intended it against the person whom he hurts or no. The defendant afterwards brings the Company into his advertisement, and couples them with the slander; and it is the whole body that is libelled under the description of "a certain Director." Slanderous matter is always sufficient to ground an information for a libel. A writing was fixed up in a church, desiring *A. B. C.* and *D.* trustees in the trust for, &c. to reform some abuses in the trust; and an information was granted for it (*a*), on behalf of all the trustees; and the Court said, that if any of them should move for another information for the same offence, judgment might be pleaded in bar; and therefore the defendant is in no danger of having a multiplicity of informations against him; and if the plaintiffs were intitled to twenty-four informations, he is the more obliged to their candour in being contented to have but one information. And when the defendant's Counsel admit this matter to be libellous, it is a very extraordinary conclusion in them to pray costs: but it is to be hoped that an information shall be granted against him.

LEE, *Chief Justice*. It is not insisted that the matter of the advertisement does not import what is libellous: it charges somebody with being concerned in the *Swedish East India Company*; which is certainly a reflection upon the person who is said to have acted so. The rule is for the defendant to shew cause why an information should not be filed against him for a libel upon the Directors of the *East India Company*; and it is objected to, as not being a libel against all of them; but the advertisement seems equally applicable to every one of the Directors. Where a paper is printed, equally reflecting upon a certain number of people, it reflects upon all; and readers according to their different opinions may apply it so. It has been the rule of this Court always to endeavour to prevent libels upon societies of men. Where the persons reflected upon are quite unknown, the Court will not grant an information. In the *Jews' Case* (*b*) it appeared by affidavit, that the persons upon whom the reflection was made were moved; but the Court held, that for the printing such an account of the *Jews* as would tend to make people believe them so barbarous as to burn a woman and her child, because it was begot by a Christian, the information ought to go. Now as this is equally applicable to all the Directors, the readers may equally apply it to any one, which is the inconveniency this Court always endeavours to prevent. If a man say, "*A. B. C.* and twenty more, (naming them) are some of them guilty of publishing a libel," I think an information would lie for it. And as this, upon the face of it, amounts to a libel, I think the Court ought to grant an information.

(a) *Rex v. Griffin*, Hilary Term, 3. Geo. 2. 2. Bar. K. B. 138. 166.
 2. Geo. 2. 2. Bar. K. B. 138. 166.

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1st PAGE, *Justice*, was of the same opinion.

PROBYN, *Justice*. By the common rules of construction it is a libel upon the whole Company, for by the figure *metonymy* the part stands for the whole; and it matters not what the writer meant, but what the reader will think of it; and it may by different persons be applied to every member of the Company. When a person says, a member of a Company, a Director, &c. has committed an offence, it is a reflection upon the whole body; for it will be hardly understood that one member alone could raise the price of green-tea; and he afterwards names the Company. I think this deserves the animadversion of the Court. The advertiser ought to know the author of this, and to produce him.

CHAPPLE, *Justice*. It is not necessary to give any opinion how the information must be drawn, or whether it must be a libel against all the Directors. It seems to be a reflection upon all the Directors, and the conclusion of it seems to throw a general reflection upon the Company. As it points out none in particular, it must reflect upon all, and create a distrust of them in the public: and therefore I think the rule ought to be made absolute, and it will be for the jury's consideration whether this reflects upon all the Company.

LEE, *Chief Justice*. The rule must be made absolute.

The defendant being found "guilty" upon this information, was adjudged in *Easter Term 1741*, to pay a fine of twenty marks.

Case 333.

The King against Harman and Others.

An order of justices appointing five overseers for the same place, is bad.

S. C. 2. Sess.

Cas. 201, 202.

S. C. 1. Const.,
page 17. pl. 9.

UPON the return of a *certiorari* (a) it appeared, that the justices had appointed the defendants *Harman*, &c. in all five in number, to be overseers of the poor of the parish of *Saint Clement Danes*; that a rate-book, not saying what rate-book, had been tendered, not saying by whom, to the defendant *Harman's* maid-servant, who refused to accept it, and threatened to throw it out of doors; that a poor's-rate was tendered to the defendant *Harman* himself, not saying by whom, but that he refused it, and neglected to execute the office and attend the justices at several meetings therein specified: wherefore they adjudged him guilty of neglecting his duty, and fined him twenty shillings for each neglect, and ordered his goods to be distrained for payment of the same.

The question was, Whether this is a good appointment of overseers, within the statute 43. *Eliz. c. 2.*; and whether the order to distrain is regular?

SIR THOMAS ABNEY for the plaintiff argued, that at common law, according to the learned *Doctor Prideaux* (b), the poor were

(a) *Ante*, 287.

(b) *Prideaux's Duty of Churchwardens*.
maintained

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maintained by the clergy and poors-box in the churches, some of which are yet remaining. The 39. *Eliz.* c. 3. which is the first statute that mentions overseers, and the ground of the statute 43. *Eliz.* upon which this appointment was made, says, "that two or more of the justices, one *quorum*, shall have power to appoint four, three, or two substantial householders of the parish to be overseers of the poor, having respect to the proportion and greatness of the same parish or parishes;" which words give the justices a discretionary power to nominate a greater number of overseers to take care of the poor, if the greatness of the parish require it. And the question is, Whether five overseers can be appointed within the statute? The 13. & 14. *Car.* 2. c. 2. s. 21. appoints "two or more overseers in *Northumberland, &c.* counties therein mentioned," and yet those counties were adjudged to be mentioned only for example; and it was held that the act extends to all *England* (a). Parishes containing several vills may have more overseers (b); and this parish of *Saint Clement Danes* has distinct vills, that is wards, and distinct jurisdictions to several purposes. Though a conviction is good or ill as to the whole, yet an order may be good for part and void for part. In the case of *The King v. St. James Clerkenwell* (c), the justices had appointed four overseers of the poor; the appointment mentioned that two of them were "substantial householders and inhabitants of the parish of *St. James Clerkenwell*," the other two were only said to be "substantial householders;" and the order was affirmed as to the first two and quashed as to the two others, though it was moved to quash the whole. This appointment names five overseers, *A. B. C. D. E.* the defendant *Harman* is first named, and therefore it is good as to him; and if void, is so only as to him who is last appointed.

As to the order for distraining the defendant's goods, that is but the justices process, and ought not to have been returned at all, for the Court never takes notice of such process.

MR. SOLICITOR GENERAL for the plaintiff. The statute of 5. *Eliz.* concerning wages, gives the justices no express power to order the payment of husbandry wages, and yet the Court allows them to make orders upon it for payment, only because it is the usage, and because no application was made here till it became a usage (d). The statute gives the justices no original jurisdiction to discharge apprentices, and yet the Court allows their usage in exercising it (e). In the case of *Madena v. Norris* (f), before the commissioners of privy council, it was held by LORD MACCLESFIELD, &c. that the commission was good by usage, though seemingly contrary to the statute of *Queen Anne*; and the late MASTER OF THE ROLLS (g) was the only one who doubted it,

(a) *Stokeland v. Brockland Lodge*,
Sett & Rem. 43. 1. Const, 68.

(b) *Rex v. Welbeck*, 1. Const, 24.

(c) *Easter Term*, 13. *Geo.* 1. *Foley*, 4.

(d) See 1. *Stra.* 3. 2. *Stra.* 1002.

(e) 1. *Const*, 504.

(f)

(g) *Sir Joseph Jekyll*.

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and refused to sit under the commission. In the *Borough of Bewdley's Case* (a) the Court would not overturn a usage of seven years, though directly contrary to the statute of *Queen Anne* in awarding a *venire*, and so was the opinion of all the twelve Judges. If this appointment is ill, the appointments ever since the year 1702 are so, and then all the parishioners who have paid to such overseers may bring actions against them. The parish of *Saint Martin's* has, for several years last, always had a greater number than four overseers; *St. Giles's* parish has several times had ten overseers, and this present year it has eight; *St. Andrew's Holborn* has had more than six overseers from the year 1692 to the year 1732, and from that time to this year it has had six; *Stepney* has had above four overseers for a great number of years. The quashing this appointment might therefore produce ten thousand actions, which all the heads at the Bar clubbed together could not defend a man against; and all these overseers are liable to the actions of the parishioners for money had and received to their use. Could it be the intent of the Legislature, in passing the statute 13. & 14. *Car. 2.* that vills should have two or more overseers, and the greatest parish in *London* should have no more than four? Wherefore he concluded that the appointment is good.

MR. HOLLINGS for the defendants. Usage, according to the opinion of LORD VAUGHAN, expounds only doubtful acts, not plain and obvious statutes. This parish has so many overseers only to have so many fines, and not for lawful convenience. The instances of usage are about the year 1702, but if that were to prevail, it ought to be the usage about the time of making the statute of *Elizabeth*; as such contemporary usage is the best expositor. If ten thousand actions may be brought for such appointments, it is a sign of ten thousand oppressions having been committed by the justices. The statute of *Elizabeth* says, "that the churchwardens of every parish, and four, three, or two substantial householders shall be overseers of the poor;" can the words "four, three, or two" give a power to appoint an indefinite number? especially as it begins with the greater number and goes downward, which is an argument that they are not to exceed four. "Overseers" are always mentioned in the plural number, so that they cannot appoint one (b), which shews the meaning of the Legislature; for when the act speaks of the justices, it says "two or more, &c." but when it speaks of the overseers, it says "four, three, or two;" and the varying the expression in the common clause shews a different intention in the Legislature. The statute 21. *Hen. 8. c. 13.* says, "that a duke may have six chaplains, &c." Can a greater number be retained within that statute? Certainly there cannot; and yet there are no negative words in that act any more than in the statute of *Elizabeth*. If a statute should appoint proof to be made by four, three, or two witnesses, could a greater number of witnesses be required? This

(a) 1. *Petr. Wms.* 207. 2. *Ld. Ray.* Rep. 550. and *Rex v. Besland*, 1. *Confl's* 1359. P. L. 15.

(b) But see *Rex v. Morris*, 4. *Term*

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is but one appointment, and the last man is as much appointed thereby as he who is first named, for it is not five different appointments. As to bringing actions against the officers, they may justify under the justices warrant, though it was illegal in the justices to grant it.

The defendant ought to have been indicted for refusing to accept the office, and not fined, after several meetings, for not coming to them; for no man can be said to be negligent in an office which he never accepted of; and they ought to have proceeded against him by indictment, as a constable must be indicted for refusing to take the office when he is chosen into it. *The King v. Pope, 5. Mod. 419.*

HAYWARD, *Serjeant, for the defendant.* This first point is, Whether the act of parliament warrants this appointment? secondly, Whether the proceedings of the justices are legal?

FIRST, To what purpose should the Legislature have appointed the number of overseers in a retrograde manner, "four, three, or two," if a greater number could be made in an unlimited manner? In the case of *The King v. Clerkenwell* there were but four overseers appointed, so that the act was not exceeded. Justices may certainly appoint payment of husbandry wages, for it is the intention of the statute that they should do so; but they cannot make an order for the payment of coachmen's or valet's wages, or the like. *Modena's Case* was not judicially determined; and it was not for nothing that so great a man as the late MASTER OF THE ROLLS dissented from it, and refused to sit under that commission; and it was but the commissioners own private judgment, which is not authority at all in law. And as to the number of actions that may arise from quashing this appointment, I believe it has been adjudged, that where a man has paid money to an officer acting under such a warrant, he cannot afterwards bring an action against him for money had and received to his use. They say, that this order ought not to have been returned, when they themselves are the persons who returned it.

SECONDLY, The justices proceeding is unwarranted by law. The proper method is by indictment (a); they might have applied for a *mandamus* to compel the defendant to execute the office of overseer: at this rate any man, your lordship, or myself, may be appointed an overseer without any opportunity of avoiding a distress. The statute appoints three meetings of the justices to be once a month, on a *Sunday*, after church; here they have met three times a month, and upon other days, and for the defendant's not attending have fined him. They may as well meet every day, and so have fined the defendant three hundred and sixty-five pounds a-year.

LEE, *Chief Justice.* There are two considerations in this case: the one is the order of appointment; the second is the order of

(a) See *Rex v. Jones*, post. 410.

distress;

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distress; and if that is to be considered merely as a warrant of distress, it ought not to be removed here, and the Court cannot make any judgment upon it. But it seems here that it must be considered as an adjudication, as much as if it were an order of removal; for it says, that *Harman* is adjudged to have neglected his duty, &c. so that it is an adjudication upon the face of it, like the case of an order of settlement, which is considered as an adjudication. The exceptions to it seem very strong, particularly in that instance of his servant's refusal of the rate-book, and his refusal of a rate, without saying who tendered them, whether a parishioner or not.

As to the other part of the case, which relates to the appointment, I am very doubtful whether it comes in such a way as the Court should quash the appointment; for if but four overseers are to be appointed and five are appointed, I cannot see but it will be void in the whole. The statute 21. *Hen. 8. c. 13.* appoints a certain number of chaplains; and where a person at one and the same time appointed more, it was held not to be void *in toto*, but that the three first promoted were well appointed, and that it was only void as to the other, *Drury's Case (a)*; but here, where we are confined to the words of the order, which is an appointment of five, we cannot determine which of them we are to strike out. I do not think this case is like the *Case of Clerkenwell*, for there the Court had a plain and distinct return to determine upon, and full direction from the statute. This appointment is *uno statu*, and we can make no difference between the first and the last named in this appointment. An appointment "for the year ensuing" has been held well enough in several cases (b).

PAGE, *Justice*. I think that both the objections are well taken; that the order is a void order; and that it ought to be quashed for the whole, for I think it is void for the whole: where a statute gives a new power or creates a new authority, it implies a negative that it shall not be exceeded.

LEE, *Chief Justice*. I do not lay any stress upon the usage that has been mentioned of parishes, for that cannot controul the law: I take the jurisdiction of the justices about wages, to arise from the liberal construction which this Court has made upon the statute, and not from their usage of such a power. In the case of an apprentice, the Court of late has allowed an application to the sessions, originally upon the construction of the act, though there is a case otherwise in *Sanders*; but the late case allowed it upon the construction of the act. In *Drury's Case* the question was, Whether the retainer was not absolutely void? and *Jenk. 272.* holds that it is void as to all; but afterwards in *4. Co. 89.* it was held not to be absolutely void for the whole.

PROBYN, *Justice*. There is no necessity for the Court to give an opinion upon the appointment, for it may come before the

(a) 4. Co. 87. S. C. *Jenk. 272.*

S. C. Cro. Eliz. 723. 839. S. C. *Moor,*

361. S. C. 110. *des Entrees*, 22.

(b) See *Rex v. Sparrow*, ante, 393.

S. C. 2. Stra. 1123. *Rex v. Seard,*

Foley, 11. *Rex v. Helling*, 2. Burr.

1905. *Rex v. Stubbs*, 2. Term Rep.

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Court in a regular way. If this order was like a process, and not an adjudication of the justices, the Court would not take notice of it; but the justices adjudge the party to be guilty of an offence, and in the same instrument they order a distress, which is like an order of settlement. But as the offences therein set forth are of a distinct nature, there ought to have been several judgments. It does not appear that the party had sufficient notice that he was appointed overseer; and therefore I concur with MY LORD and Brother that this is an order, and that it ought to be quashed.

As to the other point, where a new authority is created, it is hard to say that the justices shall exceed the number appointed by it; and, as my BROTHER PAGE says, the new authority implies such a negative. The usage that shall vary an act of parliament must not be the usage of a particular place or parish, but universal through the kingdom; and that was the *Case of Bewdley*. Usages ancient and immemorial obtain the sanction of a law, but the usages here cited are both particular, and have arisen of late years. In the *Case of Clerkenwell* there was a distinction in the return; two were well described and two not. Here the Court cannot say which overseer is appointed well, and which not.

CHAPPLE, Justice. I think it more reasonable to restrain the justices to the number appointed in the act than to permit them to exceed it; for if they may appoint eighteen, as it has been said they have done in some parishes, they may as well appoint half the parish; and a particular usage ought not to destroy an express act of parliament. And in the *Case of Brecknock* I think it was held, that a usage contrary to a charter was not good. I think the adjudication of the penalty and distress is a void adjudication in every part. The rate-book was tendered to the maid, and she might refuse it, for it does not appear to have been tendered by a parishioner, or what rate-book it was.

LEE, Chief Justice. Let the rule for quashing the order be made absolute; and let the other stand for further consideration.

Smith against Huggins, Orlebar, and Others.

Case 334.

UPON A MOTION for a new trial it appeared, that this was an action brought by the plaintiff for two thousand pounds, for oil sold and delivered by him for the *Conic Lamps*, upon the credit of the defendants as partners therein. They pleaded the general issue; and now, after a verdict for the plaintiff,

If several persons act as partners, and contract debts, and an action is brought against several persons, as those composing the whole firm, the Court will not grant them a new trial on a suggestion that all the concerned

LEE, Chief Justice, reported, that the evidence to charge the defendants was that of one Fox, who produced a paper account of oil sold between the years 1733 and 1736, and said that the manner of dealing was by giving a note promising to pay for the oil delivered at the Lamp Office, which was in the first person, and delivered by the officer, and amounted to the value of two thousand three hundred

were not named, or that some were named who were not concerned.—S. C. 2. Stra. 1142. and

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and two pounds eight shillings and tenpence. Further evidence against the defendant *Huggins* was a letter of his to *Mr. Kayner*, an attorney, in the year 1737, which was to this effect: "Sir, *Mr. Orlebar* being come to town upon *Mr. Parker's* suit do, "fires to meet *Mr. Smith* at the *Lamp Office* to consider how to "proceed; and I will endeavour to meet him there, &c." And it likewise appeared, that *Huggins* had accepted of a transfer in their stock. The evidence against the defendant *Orlebar* was likewise, that a share in the Company's stock had been transferred to his father in the year 1708; that he was administrator to his father, and had received dividends; that he was reputed to be a proprietor, and had been seen at the office. And THE CHIEF JUSTICE concluded, that upon the whole he could not certify that this was a verdict against evidence.

SIR THOMAS ABNEY and MR. HOLLINGS moved to set aside this verdict: FIRST, In point of evidence; and, SECONDLY, in point of law. FIRST, *Huggins* and *Orlebar* never concerned themselves in the direction or management of this affair. As this action was brought against the defendants in a corporate capacity, it ought to have appeared that they acted as partners, and were the only partners, though there were express evidence of other partners. SECONDLY, The patent which *Queen Anne* granted to the proprietors of the *Conic Lamps* for fourteen years expired before the sixth year of *George the First*; and if not, yet it would have been repealed by the statute of 6. Geo. 1. c. 18. commonly called the *Bubble Act*; and the proprietors cannot now be more liable, for the *Bubble Act* is a bar to the action, either upon the statute patent or without; and if so, the defendants in this case have as much right to resort to it as they would in cases of gaming, usury, &c. Wherefore the verdict ought to be set aside, and a new trial granted.

MR. SOLICITOR GENERAL for the plaintiff. There is a proviso in the *Bubble Act* that it shall not extend to any things, &c. done before the twenty-fourth of June 1718. Though the defendants were not in actual partnership, yet if they are reputed partners, it is no defence to say that they are not really so: as if a tradesman bring an action against a man for goods sold to his reputed wife, it is no defence to say that they are not really married, cohabitation is sufficient. So this being a lawful debt, the defendants acting together in this matter is sufficient to charge them, the oil being sold upon their credit. If there be any doubt in the Court, they will not grant a new trial in an hard action, or against the honesty of a cause (a). In the case of *Doerly v. Ducheſs of Mazarine* (b), a new trial was denied, though the defendant proved coverture, because it would avoid the payment of a just debt. The granting of new trials is discretionary, and not *ex debito justitiæ*; and they ought not to set aside this verdict without shewing how the action ought to be brought, as a defendant shall not abate the plaintiff's writ without giving him a better.

(a) Smith v. Page, Salk. 644.

(b) Salk. 645.

MR. FLOYD for the plaintiff. The question is, Whether this is such a verdict as an honest jury might give? for as to the weight of evidence on each side, that must be left entirely to them. The plaintiff has sold and delivered his goods; and now the question is, Whether he shall be paid for them? It is said, that this is not a lawful partnership. This is the first time that ever persons tried to bring themselves within the act of parliament. The 6. Geo. 1. c. 18. l. 19. makes such undertakings void. How? Only among themselves, but not as to others, so as to privilege them from paying their debts, for in sect. 20. there is a provision for creditors.

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SELWIN for the plaintiff. A general reputation of partnership is sufficient, unless the defendants make the contrary appear by refusal or disclaimer, &c. In motions for new trials, the Court often takes the equity of the case into their consideration. In the year 1733 the plaintiff was paid off, and the undertaking carried on continually since.

LEE, Chief Justice. At the trial this act of parliament was not considered; and it has an express proviso that it shall not extend to any undertakings before the year 1718. Then it is to be considered, Whether this is a void undertaking as to creditors. And I think the action maintainable upon the consideration, if there was sufficient evidence to charge the defendants as partners at the time of delivering the goods. And I cannot call this a verdict contrary to evidence.

PAGE, Justice. A new trial ought not to be granted.

PROBYN, Justice. The only question is, Whether there was proper evidence that the defendants were not partners in this undertaking, or that there were any others? If there had, no doubt but MY LORD would have ordered the plaintiff to be nonsuited. The evidence as to *Mr. Orlebar*, the administrator, was certainly doubtful; but it does not appear he did any act to accept of the share, or the like. He was seen indeed at the office; which is but weak evidence; but certainly it is some evidence, and so a matter proper to be left to the jury, who are to judge of it; and as they have, we are precluded. As to the matter of law, I do entirely agree with my LORD CHIEF JUSTICE and my Brother; for if the partnership was not lawful, yet as they acted together they shall be liable as partners to creditors.

CHAPPLE, Justice. As this was an action upon a contract, to be sure all parties to the contract ought to be joined; of which there being some evidence, though weak, it must be left to the jury. So that the verdict is supported by some evidence, and it is not to be taken that there were other partners at the time of the action brought, as it does not appear that there were; and if there had, the defendants might have shewn it, but the plaintiff could not: and they who are the visible apparent partners are the persons to be charged.

And

SMITH *against* And one partner alone might be charged, if he made the contract alone, as a separate person, and in his own name.
 HUGGINS,
 OULEMAN,
 AND OTHERS. LEE, *Chief Justice*. The rule must be discharged.

Cafe 335. The King *against* Jones and Another.

If a person be duly elected overseer, and refuse to execute the office, it is an indictable offence. UPON an indictment alleged to be found against the defendants at Maidstone, in Kent, "by the jurors of the king, and for the body of the county," setting forth, that three justices *quorum unus*, &c. did duly appoint the defendants to be overseers of the poor for the space of one year; and that they obstinately, &c. refused to take the office, &c. contrary to the statute, &c. The defendants demurred.

S. C. 2. Stra.

2146.

S. C. 2. Seff.

Cases, 153.

S. C. 2. Const.

page 298. pl.

347.

TAYLOR for the defendants insisted, that this was no offence at common law, nor indictable upon the statute of 43. Eliz. c. 2.; for though it must be admitted, that the refusal of an oath of office, being duly tendered, is indictable, yet where no oath or other ceremony is required, the person chosen immediately becomes the very officer, and therefore cannot be punishable for not taking the office upon him; for it is one thing to refuse taking an office, and another not to execute it when he is a complete officer. A constable may be elected at the leet, or appointed by the justices, but he is not a complete officer before his oath, and therefore is indictable for refusing to take that office upon him.

SECONDLY, The 43. Eliz. which prescribes the duty of overseers, inflicts the penalty of twenty shillings upon them for every default of absence or neglect; and a general charge in an indictment, where each particular act creates a particular offence, is not good. *The King v. Roberts*, (a). This indictment is laid to be "against the statute;" and by the statute the defendant is punishable as an officer for each particular neglect. If the defendant be an overseer, he is not indictable for not taking the office; if he is not an overseer, he is not punishable by indictment, for the statute has prescribed a punishment.

See *Rex v. Sparrow*, ante, 393.

THIRDLY, The justices have appointed the defendants for a year, which may exceed the month after *Easter* prescribed by the statute. And though it has been lately settled, that overseers may be appointed after that time, for the necessity of the thing, yet in this case there were two subsisting officers at the same time.

FOURTHLY, The indictment is ill, being said to be found "by the jurors of the king," whereas it should be, "by the jurors for the king, &c."

MR. SOLICITOR GENERAL *contra* admitted, that before 43. Eliz. c. 2. there were no overseers, so that this could not be an

(a) Carth. 226.

offence at common law. But yet it is a principle at common law, that where an act of parliament either prohibits or requires a public thing, the doing or omitting to do it is indictable by the rules of the common law which co-operate with the statute. In *The Queen v. Darey* (a), the reason given why a constable was not indictable for refusing the office is, because he is punishable in the leet (b); but in *The King v. Lowe* (c) it was adjudged, that a constable may be indicted for refusing, though punishable in the leet, and that *The Queen v. Darey* went off upon another point. To enforce obedience to the magistrate, an indictment lies for disobeying orders of justices.

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SECONDLY, He admitted that a general charge in an indictment is not good, unless in *barratry*, and there only because the defendant has a particular account given him of the matters wherewith he is charged (d). In *The King v. Wintringham* (e), an indictment against one *quia male se gessit* in his office, was held not to be good, and too general.

THIRDLY, As to the appointments, they are always "for the year ensuing."

And, FOURTHLY, As to the indictment's being by the king's jurors, "*juratores pro domino rege super sacramentum dicunt*," is the form of most of the indictments upon the file in the crown office.

LEE, Chief Justice. The exceptions to the form in the indictment are material. In *The King v. Marlow* (f), the appointment of overseers "for the year ensuing" was held to be good, an overseer being, by the act of parliament, an annual officer; and subsequent authorities have settled that point.

These are said to be the "jurors of the king, and for the body of the county," which is well enough.

The statute has appointed new officers, and annexed penalties to their neglect of duty. Now if the cause is confined to the instances of it, I should think a refusal of the office may amount to disobedience of what must be esteemed mandatory in the act of parliament, and not provided for by the clause of the penalties. And I do not see any foundation for a distinction between an officer who is to take an oath, as a constable, and such an office as this appointed by parliament without any ceremony: and every man, by the principles of the common law, is indictable for disobeying an act of parliament. This may perhaps require further consideration as to the remedy given by the act; but at present that seems to me to relate more particularly to a person's neglect after he has undertaken the office.

(a)

(b) See *Fletcher v. Ingram*, 1. Salk.

175. 1. Ld. Ray. 69.

(c) Mich. Term, 5. Geo. 2.

(d)

(e) 1. Strange, 2.

(f) Trinity Term, 13 Geo. 1.

PAGE,

THE KING
against
JONES AND
ANOTHER

PAGE, *Justice*, was of the same opinion with the Chief Justice in all the exceptions.

PROBYN, *Justice*. An appointment of an overseer for a year has been held to be well within the act of parliament; so admitted in the case of *The King v. Harman*, for it is an annual office.

The caption of the indictment is well enough.

The great objection is to the appointment in general, that a punishment is annexed to each of the breaches of duty. But the non-acceptance of the office is a breach of the law, and a breach of an act of parliament is indictable. The statute says, they shall be overseers. He who refuses to be overseer breaks the law made by the act, and in my opinion is indictable. And it is not like a general charge of a breach or neglect of duty, but is a charge of a breach of an act of parliament in not accepting the office. It has been said, that a man cannot be indicted for refusing an office where there is no ceremony required to complete the office. And this is not only a breach of the order, but of the act of parliament itself, and does not relate to the particular offences there specified, which refer only to their behaviour in the office. And my opinion rests upon this being a breach of the act of parliament. But I submit it to further consideration.

CHAPPLE, *Justice*. The appointment of overseers for a year is good.

The caption seems well. "Jurors of the king, and for the body of the county, &c." is well.

If this had been an indictment for neglecting the office, it had been too general, without specifying the particular breaches; but this is for absolutely refusing the office. In the case of a constable, the refusal of the oath is a refusal of the office. But a man may refuse an office by express words, by an entire neglect, or the like. This total refusal seems to me to be punishable no other way than by indictment. If there were to be an indictment against an overseer for not accounting, as by the act he ought, I should think it ought to be alleged that he did accept the office.

LEE, *Chief Justice*. I think the indictment does lie in this case; and as the rest of the Court are of the same opinion, there is no necessity to defer judgment in this case, unless it is desired from the Bar.

THE COURT. Let there be judgment for the king, *nisi*, &c.

HILARY

HILARY TERM,

The Fourteenth of George the Second,

IN

The King's Bench.

*Sir William Lee, Knt. Chief Justice.**Sir Francis Page, Knt.**Sir William Chapple, Knt.**Martin Wright, Esq.**Sir Dudley Ryder, Knt. Attorney General.**Sir John Strange, Knt. Solicitor General.*} *Justices.*

Walker against Kerney.

Case 336.

UPON some oppression and extorting of money from the defendant by some sheriff's officers, a rule was made for the officers to answer the matter in the defendant *Kerney's* affidavit. Upon shewing cause,

IT WAS OBJECTED, that the affidavit could not be read, because the party who made it was convicted, had judgment, and stood in the pillory for forgery; and a record of *Kerney's* conviction, with the judgment entered thereon, was produced in court.

LEE, *Chief Justice.* The question is, Whether the affidavit of a person who has been convicted, received judgment, and stood in the pillory for forgery, all of which have been made out by producing before us a copy of the conviction and judgment, and by the affidavit of a gentleman to *Kerney's* standing in the pillory in the year 1728, and also to the identity of the person, can be read in support of the present complaint. And upon the best consideration of this case, and the footing of the determinations that have been like to this, or seem to me to bear a near analogy to it, I am of opinion, that this affidavit cannot be read. The case in 5. *Mod.* 74. (a) is certainly the same case of which there is mention made in 2. *Salk.* 461. which is this: *Davis* and *Carter* being convicted of forging a Bank bill, and having stood in the pillory for it, and being also committed to *Newgate* until they paid the fine set upon them, were brought up to the court of king's bench,

The affidavit of a person who has been convicted of forgery cannot be read in support of a complaint, but may be read in exculpation of a charge.

S. C. 2. Stra. 1143.
Co. Lit. 6.
3. Lev. 436.
2. Hale, 277.
2. Hawk. P. C. ch. 46.
2. Will. 225.
Tidd's Pract. 39.
Gill. L. E. 146.

(a) See the notes to this case.

WALKER
against
KERNEY.

3. Stra. 371.

and they prayed that they might be turned over to *the Marshalsea*, because the sheriff of *London* oppressed them in *Newgate*; and their own affidavits were offered to prove the oppression: and by the Chief Justice, if a man has had an infamous judgment, and has stood in the pillory for an offence which is contrary to the faith, credit, and trust of mankind, as forgery is, he cannot be a witness in any cause. HALE says (a), "if a man has stood on the pillory, he cannot be a witness." But that is to be understood of an infamous judgment. But if a man be convicted of a libel, and has been in the pillory for it, yet perhaps he may be a witness: and the affidavits of *Davis* and *Carter* were not read. The account of this case in 2. *Salk.* 461. is a very loose one, and such as I cannot pay any regard to, and therefore must depend upon the case as I have read it to you out of 5. *Mod.* 74. The case of *Delabaut v. Nichols* (b), I am informed, was a motion to discharge a man upon common bail, the only affidavit to prove the debt being that of a person who was convicted of forgery, &c.; and the Court discharged the defendant upon common bail, because the affidavit of a person under such circumstances was no affidavit within the act of parliament; and therefore debt was sworn to, to hold the party to special bail. The case of *The King v. Charlesworth*, in this court, in LORD RAYMOND's time, is reported by MR. LACY from the Bar to be an information against *Charlesworth* for forging a warrant of attorney, for which he was convicted, had judgment, and stood in the pillory; and that, upon a motion for an attachment against him for some contempt of the court, he offered to clear himself upon his own affidavit; and the Court admitted it, because it was only to purge himself, and not to accuse or charge a third person; as the Court said, they might as well admit his oath now as upon interrogatories. I myself remember the admitting the affidavit of *Charlesworth* to be read, and that it was to clear himself of a thing laid to his charge; but any further I do not know; but there is all the reason in the world to believe, that the case is as MR. LACY has cited it to me: and there is room for that distinction where an affidavit of an infamous person shall be read to clear himself, but not to charge a third person; and if his affidavit were not to be admitted in case of an attachment, he would be condemned in the first instance. The case of a *quaker* I take to be strong in point against the admission of *Kerney's* affidavit. You tell us, here is a man who has received an injury, and will not the Court hear his complaint? We answer, It is the course of the Court that no complaint can be received but upon affidavit; and if *Kerney* cannot make an affidavit, we cannot admit his complaint. This is also the case of *quakers* in criminal matters, who refuse to take an oath, in which case we cannot relieve them. In the *Case of Hilton* (c), there was an application to this Court by a *quaker* for a breach of the peace to have articles exhibited against the party upon his

(a) 2. Hale, 277. and see 4. Hawk. P. C. 436.

(c) *Hilton v. Byron*, 12. Mod. 247. S. C. 3. Salk. 133. 248.

(b) *Barnes*, 78. Pract. Reg. 49.

solemn affirmation, which was denied by the Court; for a solemn affirmation does not amount to an oath in criminal matters; and without an actual oath, we cannot make a person find sureties of the peace, though he has done ever so great a personal injury to a quaker. There has been some doubt, indeed, upon the construction of the statute, whether articles of the peace are of a criminal nature? But there have been many cases where an attachment shall not issue upon a quaker's (a) affirmation. Therefore I am of opinion, that *Kerney's* affidavit is not to be read, and that the rule is to be discharged.

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against
KERNEY.

PAGE, *Justice*, was of the same opinion (b).

CHAPPLE, *Justice*, was absent, and sick at Bath.

WRIGHT, *Justice*. It is admitted, that an infamous person cannot be admitted as a witness in civil cases, not even in the case of a third person, because of the supposed iniquity of his evidence. But it is said, though he cannot be a witness in civil matters, yet he may be an accuser, for it is for the public weal that offenders should be prosecuted. But there is a clause in *Magna Charta*, c. 28. in these words, "*Nullus ballivus ponat aliquem ad legem manifestam nec ad juramentum simplici loquelâ suâ, sine testibus fidelibus ad hoc inductis.*" Now the word "*ballivus*" includes all the officers of justice in this kingdom, and among the rest this Court. What then is the meaning of the words "*credible witnesses*?" They must certainly be applied to persons that are not so; and an infamous person can never be a credible witness. It is of the utmost consequence that persons who are infamous should rather be restrained from being accusers, than witnesses in civil matters and affairs of property; for if they were allowed to accuse, the lives of multitudes of people of reputation and innocence might be taken away, or at least brought into danger, by persons who have forfeited all pretensions both to reputation and innocence.

THE COURT. Let the rule be discharged.

(a) See *Rex v. Gardner*, 2. Burr. 1117. *Atcheson v. Everitt*, Cowp. 392.

(b) It is now settled, in the case of *Penlock v. Mackender*, 2. Will. 18. that it

is the infamy of the crime, and not the nature of the punishment, that renders the party an incompetent witness. — See also the Notes to *Davis' Case*, 5. Mod. 74.

E A S T E R T E R M,

The Fourteenth of George the Second,

I N

The King's Bench.

*Sir William Lee, Knt. Chief Justice.**Sir Francis Page, Knt.**Sir William Chapple, Knt.**Martin Wright, Esq.*} *Justices.**Sir Dudley Ryder, Knt. Attorney General.**Sir John Strange, Knt. Solicitor General.*

Barnesly against Baldwyn.

Case 337.

THE DEFENDANT, in consideration of a gold watch, promised to pay to the plaintiff, or order, the sum of eleven pounds on the day of his, the defendant's, marriage. The defendant married, and the plaintiff brought his action on the case, and declared on the statute 3. & 4. *Anne, c.* as for a negotiable note payable on the defendant's marriage, with an averment that the defendant was married. There was a verdict for the plaintiff. And on a motion in arrest of judgment,

A note made payable to A. or order on the day of the drawer's marriage is not negotiable within the 3. & 4. *Anne, c.*

S. C. Stra. 1151.
Stra. 706.

THE QUESTION was, Whether the above note was negotiable within the statute?

CLAYTON for the defendant argued, that it was not negotiable within the statute, because it was uncertain in its time of payment, and depended upon such a contingency as the money might never be paid. He cited the case of *Jocelyn v. Lacere (a)*, that a bill of exchange requiring a person to pay seven pounds out of an annuity was held not good, because the fund might not answer it; and *Jen-*

(a) 2. *Ld. Ray.* 1362. *Fort.* 281.

BARNESLY
against
BALDWIN.

n. y. v. Earl (a), where a bill of exchange to pay money out of a fund belonging to the governor and company of *Devonshire Miners* was held not good; and *Pearson v. Garrett (b)*, and *Smith v. Boheme (c)*, *Michaelmas Term*, in the first year of *George the First*, that a promissory note to pay *£. S.* forty pounds, or to surrender the principal, is not a good negotiable note; and *Appleby v. Biddle (d)*, where a promissory note to pay a sum of money, if his brother did not pay it within a month after *Michaelmas*, was held to be no good negotiable note. So also in the case of *Morrice v. Lee*, *Easter Term*, in the eleventh year of *George the First*, *Mod. Caf. in Law and Equity*, 362.

MR. DENNISON for the plaintiff argued, that the act does not limit any time for the payment of notes; and though this note did originally depend upon a contingency, yet now, *certum redditum est*, for the time is actually come, and the money payable; and cited *Andrews v. Franklin (e)*, which was a bill of exchange to pay a sum of money when a certain ship or man of war should be paid off, and held good. The like point in the case of *Lewis v. Ord (f)*, *Trinity Term*, in the eighth and ninth years of *George the Second*, at the Sittings in *Middlesex*, by Lord Chief Justice HARDWICKE. And this last MR. DENNISON cited from a note of Mr. Filmer's.

LEE, Chief Justice, admitted, that by the statute promissory notes are made of the very same force, have the same remedies, and are under the same constructions, as inland bills; and that if an inland bill of exchange, payable on the day of marriage, is not good, neither is a promissory note of the like form made negotiable by this statute. There can be no doubt, added he, but that the plaintiff has another remedy upon a note of this sort than by declaring upon the statute; but then he must prove a valuable consideration, which he need not do upon the statute. The words of the act of parliament in description of notes is in very general terms, "for payment of sums of money," and goes no farther. But he was of opinion, that every promissory note must have two essentials to bring it within the statute: the one, that it must be for payment of money merely; the other, that such money must be paid at all events. The cases cited turn all upon these two principles. The case of *Smith v. Boheme* was held not within the statute, because it was not a cash note absolutely, but was either to pay money or do another act, viz. surrender the principal. And the cases of *Jocelyn v. Lacere* and *Jenney v. Earl* were not good, because, being bills of exchange upon funds which might fail, they did not become payable upon all events. So the principal case is by no means payable at all events, being upon the day of the defendant's marriage, which is an act entirely in his own power,

(a) 8. Mod. 265. 2. Ld. Ray. 1361.

1. Stra. 591.

(b) 4. Mod. 242. Skin. 398. Comb.

227.

(c) 8. Mod. 362. Gilb. 93. Ray. Ent. 92.

(d) 12. Vin. Abr. 208. pl. 18.

(e) 1. Stra. 24.

(f) Cunningham on Bills of Exchange, 113.

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against
BALDWIN.

whether he will make the money payable or not. And THE CHIEF JUSTICE said, he did not know how to distinguish between this case and that of *Appleby v. Biddle* (a), where the same exception was taken, as here; by SERJEANT PENGELLY; and there was a rule to shew cause; but he did not find that any thing farther was done in it; that he ordered MR. MUNDY, *Clerk of the Rules*, to see whether anything farther was done, who told him, there was not. As to the case of *Andrews v. Franklyn* (b), I do not find there was any judgment in that; and the case of *Ord v. Lewis* was upon the same point. But he owned he was of a dissentient opinion to the determinations of both those cases.

PAGE, CHAPPLE, and WRIGHT, *Justices*, were of the same opinion; that the principal note was not within the statute, for that nobody would give credit to or accept such note for a cash note, and that it was not in its very nature negotiable, for that very reason.

But WRIGHT, *Justice*, differed a little from THE CHIEF JUSTICE as to the essentials to a note within the statute, and that there were some events that would not make a note bad within the statute; as a note payable when a ship shall be paid off is good; for such event is certain enough; it is a public thing; and depends upon credit: and he said, that my *Lord Chief Justice PARKER* cited the same case, and admitted the same thing, in the case of *Appleby v. Biddle*.

LEE, *Chief Justice*, inclined to be of the same opinion; and said, he should be glad to know whether the case of *Andrews v. Franklyn* was ever determined; that he now thought the paying off of ships was punctual, and very certain, but that he did not know whether to pay money at the return of a ship would be good or not.

THE COURT, however, did not give this as their final opinion. But on the last day of the Term the Court affirmed their former sentiments. And

LEE, *Chief Justice*, expressed himself again to this effect, that the judgment should be arrested, because it is not a note within the statute, for that the statute, as appears by its preamble, was made in order to render notes assignable for the encouragement of trade, and therefore notes respecting trade only are within it; and that it was under this consideration that *Lord Chief Justice PARKER*, in the case of *Smith v. Boheme*, said, that the statute only extended to cash notes, and to such cash notes only by which an immediate benefit or interest vested in the assignee. The case in 4. *Mod.* 242. is like the principal case, which was held not to fall within the custom of merchants, because it being to pay money upon such an uncertain event cannot be called trading. In the present case the party, if he was to assign, would have no debt, no benefit, no interest in him at the time of assigning, and therefore the note cannot be within the statute. And we are now of opinion, that promissory note,

(a) 12. Vin. 208.

(b) 1. Stra. 24.

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against
BALDWIN.

made payable when a certain ship which is returned shall be paid off, are good for the reasons my Lord Chief Justice PARKER gave in the case he cited in *Appleby v. Biddle*.

The judgment was arrested (a).

(a) See *Evans v. Underwood*, 1. Will. Lynch, 2. Ld. Ray. 1563. *Roberts v. 362. Dawkes v. Delovane*, 3. Will. Peake, 1. Burr. 323. *Carlet v. Fant 207. 1. Black. Rep. 782. Banbury v. court, 3. Term Rep. 432. Luffett, 2. Stra. 1211. Haydock v.*

Case 338. Doe, on the Demise of the Duchess Dowager of Hamilton, against Atherly and Others.

IF an ejectment be brought on the demise of husband and wife, the wife is included in a rule of court that "dimissor querentis shall pay the costs," and if, after the death of her husband, she bring a new ejectment for the same premises, the court of king's bench will stay the proceedings until the costs in the former action be paid (a), although such action was brought in, and the rule for costs made by, the court of common pleas.

S. C. 2. Stra. 3152.
1. Stra. 681.
2. Black. Rep. 1180.

THIS was a MOTION to stay proceedings, in an action of ejectment, till costs should be paid upon a former ejectment, which had been brought by the present *Duchess of Hamilton*, together with *the Duke* her late husband, in the court of common pleas, in the year 1710; in which cause there was a rule entered into in these words, "that in case of a nonsuit or verdict against the plaintiffs dimissor querentis sit onerabil. cum solutione custagior. per Cur. allocand."

Upon a trial at bar there was a verdict and judgment for the defendants, which judgment was affirmed in the king's bench, and also in the house of lords. There was an affidavit that no costs had been paid by the late *Duke* or the present *Duchess*, though often demanded; that *the Duchess* was the surviving lessor of the plaintiff in the former ejectment; that these ejectments were brought for the very same lands, and against several of the same defendants.

THE COUNSEL for the *Duchess* offered several reasons to excuse her from the costs of the former ejectment.

FIRST, That she was not within THE RULE, it being in the singular number, *dimissor querentis sit*, &c. which must mean *the Duke*, for as she was a *feme-covert* she could not make any such demise to try her title on the ejectment; and admitting she did not enter into the rule, she is not now liable to the costs, but the defendants must pursue the costs into the hands of *the Duke's* representatives.

THE SECOND was, That admitting *the Duchess* to be a party to the rule, that the word "dimissor." with a turn up to be put for *dimissores*, and the word "sit" to be mistaken for "sint;" yet that *the Duchess* being *covert* could not, by entering into rules of court, so far involve her consent therein as to bind her after her husband's death; that no contract could bind her but that solemn one of levying a fine upon record; that entering into rules of court

(a) See *Short v. King*, Stra. 681. 2. Black. Rep. 1180. *Hullock on Costs*, 446.

are contracts; and that the Courts enforce the execution of such contracts by attachment.

THE THIRD was, That as this is a rule of the court of common pleas, the parties ought to have prosecuted for the costs by attachment in that court; and that this Court cannot enforce the rules of another court.

FOURTHLY, That this Court will not interpose after such a length of time as thirty years. *Comb.* 106, 110.

TO THIS it was said, that the length of time was no objection, because *the Duchess*, being a peeress of the realm, was privileged in her person, and that it was impracticable to find a person so hardy as to take her up by attachment, which is the only remedy upon rules of court, for fear of the resentment of the house of lords.

THE FIFTH and last was, That as there are only five defendants in the former ejectment that have survived and are entitled to costs, and are made defendants in the present ejectments, together with thirty or forty more persons, it is not equitable that proceedings should be stayed against those who were not vexed in a former ejectment, and in no wise intitled to costs.

TO THIS it was answered by the Counsel on the other side, that the Court will take notice that *Mr. Fleetwood* was at all the costs, and not any of the immediate tenants.

LEE, *Chief Justice*. If the defendants had come into this court for an execution of THE RULE entered into in the common pleas for payment of costs, they must have been disappointed in their motion; but as this is only a motion to stay proceedings on the present ejectment till the costs on an antecedent one are paid off, it is a proper one, and we will grant it, though we have no direct power to enforce *the Duchess* to pay costs accrued in another court.

As to the wording of the rule, I think *the Duchess* is clearly comprehended in it, for it appears that this is an ejectment on the demise of *the Duke and Duchess*, whereby they are considered as jointenants and as one person only, and as so included properly enough under the word "*dimissor. querentis*" in the singular number; and twenty jointenants under the same title will be esteemed as one person, and be comprehended under the same expression *dimissor. querentis*.

As to their being different defendants in this ejectment to what they were in the former, and that we should stay proceedings in the present one only against such as were defendants in the former, and who are intitled to costs upon the former, I know no precedent of that sort where proceedings in ejectment have been stayed against part of the defendants and admitted to go on against the other part. And I know no certain measure the Court has to go upon in such cases; for, though there are new defendants, yet it does

Doz,
ON THE DEMISE OF THE
DUCHESS
DOWAGER OF
HAMILTON,
against
ATHERLY
AND OTHERS;

DOES;
ON THE DE-
MISE OF THE
DUCHESS
DOWAGER OF
HAMILTON,
against
ATHERLY
AND OTHERS.

does not appear but that they are under-tenants to the persons who were defendants in the former action.

The reason why the Court stay proceedings on a second ejectment is to prevent vexation, for it is in the power of a person to bring as many new ejectments as he pleases, unless he has been enjoined to the contrary by the court of chancery, which this Court has no power to do. Therefore where a plaintiff has had judgment in a former ejectment against him, and is for bringing a new one, we cannot deny it him absolutely; but as it is a creature of the court, and an equitable proceeding, we grant it him upon paying the costs, and making the recompence for the vexation he had caused in the prior ejectment. 4. *Mod.* 379. If this rule of court was to be considered as a matter of mere contract, *the Duchess* could not be bound by it, as being a *feme-covert*, and incapable of consenting to it; but, considering the rule of court as a judicial proceeding, she is certainly obliged by it; and these rules of courts for payment of costs by plaintiffs are substituted by the Court to put the lessor of the plaintiff in the same condition as a real plaintiff in another action. Suppose an action is brought by husband and wife, and they are nonsuited, and then the husband die, I apprehend the wife who is party to the record will be answerable for the costs. The equity for the defendants, in the present case, seems to be very strong; for suppose the husband in this ejectment should die, who is lessor of the plaintiff, the lessee may notwithstanding go on, and the wife will be entitled to the recovery, and shall have costs against the defendants: but suppose the lessee is nonsuited, or a verdict against him, in what condition will the defendant be if the wife is not liable? Why, he can have no costs at all; not against the lessee, who is plaintiff, for he is only an imaginary and fictitious person. Besides, seeing *the Duchess* is surviving lessor of the plaintiff in the former ejectment, and consequently will be presumed to proceed upon her title of survivor, which will depend upon the same title as in the former ejectment, namely, the deed which created the jointenancy; if she proceed upon another title, she ought to set it forth by affidavit on her side; and since the ejectment is for the same lands and between the same parties, I am of opinion to stay the proceedings till payment of the costs.

PAGE, *Justice*, was of the same opinion.

CHAPPLE, *Justice*. The nature of a proceeding by ejectment is to be considered as a creature of this court, in which the lessor of the plaintiff has a great many advantages, and the present one of bringing as many ejectments as he pleases by means of this new-invented method of action; because the real plaintiff is a fictitious person, so that no prior ejectment or judgment can be pleaded in bar against him: but if the lessor of the plaintiff were to be a real plaintiff upon record, he would be as much barred by a judgment in ejectment as in any other action; and I

Doe,
ON THE DE-
MISE OF THE
DUCHESS
DOWAGER OF
HAMILTON,
against
ATHERLY
AND OTHERS.

an of opinion, that by such a rule of court as this the plaintiff is reduced into the same circumstances as an actual plaintiff, and liable to costs, though he would not have been so without the interposition of such a rule, because he does not appear upon the record. Suppose an ejectment by husband and wife, the husband dies, it has been determined in the case of *Thurstout v. Grey* that the lessee shall, notwithstanding, proceed, because the lessor being neither plaintiff nor defendant upon the record, his death cannot cause any abatement, and the wife shall be entitled to recover the term with costs against the defendant, who in equity ought to have the same benefit against her. This must be taken to be the same title; for it is sworn to be by the survivor of the lessors of the plaintiff; and if there is any new title, it should have come on the part of the defendant to have sworn it.

WRIGHT, *Justice*, of the same opinion.

The rule was made absolute to stay the proceedings till payment of costs.

Thompson against Slicer.

Case 339.

ACTION ON THE CASE in *Ireland* on a promissory note, by an indorsee against the drawer, which went down to trial, and the jury found a verdict that the plaintiff should recover against the defendant for his damages the sum of one hundred and sixty pounds four shillings and sixpence, and for his expences and costs sixpence. The judgment thereupon was in these terms: "It is therefore considered, &c. that the plaintiff shall recover against the said defendant the said sum of one hundred and sixty pounds four shillings and sixpence, by the said jury in form aforesaid found, as also the sum of fifteen pounds twelve shillings and ten pence for his damages which he sustained, as well for the defendant's not performing his promises and assumptions aforesaid, as also for his expences and costs." This judgment was removed by writ of error into this court.

And now IT WAS MOVED to make two amendments by virtue of the 16. & 17. *Car.* 2. c. 8.

THE ONE, that the words "shall recover," in the judgment, be altered to "do recover."

THE OTHER, that the sum of "one hundred and sixty pounds four shillings and sixpence" be amended, and that sixpence given for costs by the jury be added to it, and that it be made one hundred and sixty pounds five shillings.

IT WAS OBJECTED to the amendment, that the Court cannot amend such judgments as are given in *Ireland*; the words of the statute being, "that if any verdict be given in any action in any of his majesty's courts of record at *Westminster*, the counties palatine of *Chester*, *Lancaster*, and *Durham*, or in *Wales*, no judgment shall

Amendment
made in an ac-
tion from *Ireland*
on a promissory
note, by insert-
ing in the record
"do recover"
instead of "shall
recover."

THOMPSON
against
SLICKER.

"shall be stayed or reversed, &c.;" and that these words do not extend to *Ireland*. It was farther objected, that if *Irish* judgments are amendable here (a), yet these are such faults as are not amendable anywhere within the 16. & 17. Car. 2.

LEE, *Chief Justice*. I apprehend that it hath been settled in the case of *Byrne v. Byrne* (b), that a judgment given in *Ireland* may be amended upon error here in *England*; for it cannot be amended in *Ireland* after it has been removed here by writ of error; for upon error the record itself, and not the transcript, is removed, and the record is so far a record of this court that we cannot transmit it to *Ireland*, *Yelv.* 117, 118. : and though the first words of the statute extend only to the courts of *Westminster*, *Chester*, *Lancaster*, and *Durham* and *Wales*, yet there are general words in the close of the first section that take in *Ireland*. The words are, that all such omissions as are before enumerated in that act of parliament, and "all other matters of the like nature, not being against the right of the matter of the suit, nor whereby the issue or trial are altered, shall be amended by the Justices or other Judges of the courts where such judgments are or shall be given, or whereunto the record is or shall be removed by writ of error." The case of *Byrne v. Byrne* was a writ of error out of *Ireland* upon a judgment in dower, in which there were two *misericordia's*, and it was moved to strike out one, which amendment was accordingly made: so in *Sir T. Jones*, 199. a judgment in *Ireland* was amended in this court, though before the making of this statute.

AS TO THE OTHER OBJECTION, that judgments are not amendable within this statute, because judgments are not expressly named in the enumerating part of the statute, I think they are amendable within the general words, that "all other matters of the like nature with those particularly enumerated not being against the right of the suit, nor whereby the issue or trial is altered, shall be amended accordingly." Several judgments have been amended thereby, which I shall mention in this case.

It being therefore plain, that not only a judgment, but a judgment out of *Ireland*, may be amended, it may be proper to consider the amendments prayed for upon the present judgment.

THE FIRST is, that the word "shall" may be altered to "do." There have surely been such amendments as this in the court; the case of *Forster v. Blackwell* (c) was upon a judgment entered up in these words, that the plaintiff "ought to recover," which was amended to "do recover;" and the *Case of Blackey and Birmingham* in this court, *Easter Term*, 13. Geo. 2. was, that the plaintiff "should recover," and the judgment was altered to "do recover."

THE SECOND is, that the judgment may be amended from the verdict, and that the sixpence given for costs in the verdict and

(a) See now the statute 22. Geo. 3. c. 53. and 23. Geo. 3. c. 28.

(b) Mich. Term, 8. Geo. 2.

(c) 1. Barnes Notes, 11.

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omitted in the judgment, may be now added in the judgment. This last seems to me very much to depend upon this, whether there be sufficient authority to amend upon the foot of misprision; and I am of opinion that there is, for there was enough found upon the verdict to enter up the judgment in the form it is now prayed to be; and I think the case of *Fuller v. Smith* (a) is strong in point: that was an action of trespass, in which the jury found the defendant guilty as to part of the trespass, and as to the residue not guilty; upon the entering up the judgment, that part of the verdict which acquitted the defendant was omitted; and yet it was held amendable as a misprision, because there were sufficient findings with the verdict to have guided the entrance of the judgment by; and the verdict is a sufficient warrant or authority to amend the judgment by, the judgment being grounded upon the verdict.

CHAPPLE, PAGE, and WRIGHT, *Justices*, agreed; but the Court, notwithstanding, said, they would consider farther of it; and now, on the last day of the Term,

LEE, *Chief Justice*, delivered the opinion of the whole Court in these words: It is our unanimous opinion that the amendments prayed for may be granted. The true distinction in relation to amendments of judgments before the statute of 16. & 17. *Car. 2.* seems to be this, That where mistakes in judgments were in any matter in which the clerk had no instructions in the record to guide the clerk in his entry of the judgment, such mistakes were not amendable, exclusive of the statute of *Charles the Second*, because they were considered as errors and faults of the courts; but if the clerk had sufficient instructions, his mistakes were amendable. Before the statute of *Charles the Second* there are numberless authorities to prove this distinction, but I shall only cite two or three, *Cro. Eliz.* 497. 1. *Roll. Abr.* 205, 206, 1. *Vent.* 133. 2. *Lev.* 22. The first amendment, which prays that the word "shall" be altered to the word "do," seems to be a case that would fall under the determination of making no amendment, as being a fault of the Court; but this mistake is made amendable under the statute of *Charles the Second*. The statute gives some instances of judgments that could not be amended before this statute; as the entry of a *capiatur* instead of a *misericordia* could not be amended before this statute, as being a fault of the Court; so "*concessum est*" for "*consideratum est*" could not be amended, for that is not the language of the Court. The objection to the present amendment being within the statute of *Charles the Second* is, that this statute, as to the first part, is to be considered as a statute of Jeofails and not of amendments; and to be sure that is true, for the words are, "that no judgments shall be arrested for want of form, &c." that the statute then names the courts, and confines them to *Westminster*, the counties palatine, and *Wales*; but at the end of the statute there are more general expressions, which

(a) Mich. Term, 1. *Geo. 2.*

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make it a statute of amendments. It is then objected, that the words "such judgments" must relate to the judgments given in the courts before mentioned in the beginning of the statute, viz. *Westminster, &c.* and that they cannot extend to judgments given in *Ireland*; but we apprehend the jurisdiction this Court has always exercised over judgments in *Ireland*, will bring it within the case of other inferior courts: and it is a rule, that wheresoever the court below has power to make amendments in its records, this Court has the like power by law to make such amendments, when the records are removed into this court by writ of error. Now this statute is expressly enacted in *Ireland*; and as we are of opinion the Court in *Ireland* might make such amendments by the statute, we also may do it. And we see no difference between the court of king's bench in *Ireland* and the court of common pleas in *England* as to this purpose, for we have exercised this power of amending the records of both courts indifferently. There are precedents of our amending judgments in *Ireland* in *1. Roll. Abr. 209. 1. Vent. 117.*

What LEE, *Chief Justice*, added was to the same purpose as what he had above mentioned on the former day.

And it was now determined to grant the amendments as prayed.

Case 340.

Smith and Palmer against Scarffe and Abbott.

An acceptance
"to pay a bill
"of exchange
"when certain
"goods are
"sold," is a
good acceptance,
though condi-
tional.

S. C. 2. Stra.
1152.

2. Stra. 1212.

ACTION upon a bill of exchange against the acceptor. The plaintiff declared upon this special acceptance, viz. "to pay the bill when goods sent by the drawer to the acceptor should be sold." There was an averment in the declaration that the goods were sold; and a verdict for the plaintiff.

IT WAS NOW MOVED *in arrest of judgment*, because such a special acceptance as is laid in the declaration will not bind the acceptor, it being uncertain when the goods shall be sold.

LEE, *Chief Justice*, declared the opinion of the Court in these words: It was an observation of my Lord *Chief Justice HOLT*, that though the acceptor of a bill of exchange makes himself a debtor by the custom of merchants; yet he is properly a debtor at common law, for an acceptance amounts to a promise at law to pay, and this grounded on a regard had to trade. Adopting this rule the question will be, What sort of acceptance it is that amounts to a promise to pay at common law? It has been adjudged, that an acceptance of a bill of exchange will bind the acceptor, though not made according to the tenor of the bill drawn; as an acceptance to pay *secundum tenorem billæ* after the bill is lapsed is a binding acceptance (a); is an acceptance for a longer time than the bill is drawn is binding (b). The case of *Weather-*

(a) *Salk. 129. Carth. 466.*

(b) *Molloy De Jure Marit. 304.*

coffe

Jeff v. Keene (a) bore two arguments, and was adjudged in *Michaelmas Term*, in the sixth year of *George the Second*, that an acceptance of a bill in part is good, and should bind for no more than the part so accepted; and *Lord Chief Justice EYRE* thought an acceptor must answer only for so much as he has accepted, for he is bound by his own acceptance. A man is not tied down to a general acceptance, but may accept a bill under what restrictions he pleases; as to pay part in money and part in bills; which is the case in *Comb. 452.* where it was proved by merchants, that there might be a qualification of an acceptance; for he who may refuse a bill *in toto* may in part, and may accept it for part, if the person to whom the bill is payable will agree to take it so; but it is in his power either to agree to such acceptance or to return the bill. So also a person may accept a bill conditionally; which was the case of *Corr v. Coleman* (b): A foreign bill of exchange was drawn upon the defendant *Coleman*, and was returned for want of acceptance; *Coleman* then said, "If the bill is brought back, I will pay it;" which was adjudged by the Court a good acceptance, though a conditional one. AND WE ARE OF OPINION, that if a drawer accept to pay part of a bill only, he shall not be charged with the unaccepted part, but the drawer shall be security for and answer that. Therefore, upon the authority of these cases and the reason of the thing, the rule for arresting judgment must be discharged (c).

SMITH
AND PALMER
against
SCARFF
AND ABBOTT.

(a) *Easter, 4. Geo. 2.*

(b) *Mich. Term, 6. Geo. 1. Cum.*
on Bills of Exchange, 27.

(c) See *Banbury v. Liffett, 2. Stra.*
1212. *Julian v. Shobroke, 2. Will. 9.*
Sprout v. Mathews, 1. Term Rep. 122.

Wilder against Hendy.

Case 341.

THIS was a motion, after a verdict for the plaintiff to amend the record of *nisi prius* and the *issue roll* by the bill on the file (a), by striking out the word "Whereas" in an action of trespass for killing the plaintiff's dog. *Cro. Jac. 587. Forster v. Blackwell, Easter Term*, in the tenth year of *George the Second*. 8. Co. 161, 162.

IT WAS SAID *against the amendment*, that the declaration beginning by the word "Whereas," which is more than a recital, and no positive allegation of any part, is not amendable, because matter of substance. In case, covenant, &c. "Whereas" is good, because it is only inducement, and that which is the *gist* of the case afterwards positively alledged. Suppose no consideration was alledged in *assumpsit*, this Court cannot amend. Want of certainty is not amendable by the statute of 16. & 17. Car. 2. c. 8. which is the only act on which this amendment cannot be made. *Cooper v. Spencer* (b).

(a) The Court would not permit the time of filing the bill to be enquired into.

(b) 8. Mod. 376. S. C. 1. Stra. 641.

On

WILDER
against
BLANDY.

IT WAS SAID *on the other side*, This comes within the proviso of the statute of 16. & 17. Car. 2. c. 8. because it will alter the issue, none being joined as it stood on the recital (a). In the case of *Smith v. Blackerly* (b), in trover for a gelding, it was moved to amend the *nisi prius* roll by *the bill*, by altering *the defendant's* name to *the plaintiff's*; and the Court amended it.

LEE, *Chief Justice*. The objection without an amendment is sufficient to arrest the judgment, and the amendment cannot be made without something to amend by. It appears, that here is a bill on the file, and we cannot take notice when it was filed, but must take it to be filed before the record of *nisi prius* was made up. The question then will be, Whether the clerk's not pursuing his instructions, though in a matter of substance, is not a misprision? The rule that I have observed to prevail is, whether the clerk had a proper foundation to make up the record right, and whether the amendment did not extend to affect the authority of the Judge at the trial of the cause. This amendment does not; for the enquiry upon this issue could only be, whether the defendant killed the plaintiff's dog, which must have been if the declaration had been right. In the case of *Smith v. Fowler* (c), trover against fifteen; the plaintiff in laying the conversion had omitted one of the defendants; all pleaded "not guilty;" and after verdict, though no issue was joined as to one, yet the Court amended the declaration; for it is supposed there was evidence against them all, or else the Judge would not have admitted the verdict. In the present case, here is a bill to amend by; and as this is right, we must look on the mistake as a misprision of the clerk, and so amendable.

The rule was made absolute.

(a) See Yelv. 65. Cro. Car. 204.

(b) Mich. Term, 13. Geo. 2.

(c) Mich. Term, 3. Will. 3. in the common pleas, 1. Ld. Ray. 116.

MICHAELMAS TERM,

The Fifteenth of George the Second,

IN

The King's Bench.

*Sir William Lee, Knt. Chief Justice.**Sir Francis Page, Knt.**Sir William Chapple, Knt.**Martin Wright, Esq.*} *Justices.**Sir Dudley Ryder, Knt. Attorney General.**Sir John Strange, Knt. Solicitor General.*

Dent against Coates.

Case 342.

LIBEL IN THE SPIRITUAL COURT for not paying a poor's rate, where a custom pleaded, and a prohibition granted. The custom was traversed, and found by the jury. A consultation was awarded by the court of king's bench, because the custom found was unreasonable, and against law (a).

Prohibition granted after consultation on re-stating a custom which had been before defectively alleged.

S. C. 2. Stra. 1145.

The plaintiff now altered the custom, and set it out differently, and moved for another prohibition, and insisted, that the merits of the case were never tried, and that the consultation was awarded merely because the custom was not well set out, being uncertain, and therefore against law; and cited *Stroud v. Hopkins* (b), where the difference is taken between a consultation being awarded for any fault of the prohibition in form, and where it is granted upon the right of the thing in question; in the former case, a second prohibition will lie, in the latter it will not.

The defendant insisted on the 50. *Edw. 3. c. 4.* which says, "that no prohibition shall be allowed after consultation duly granted, so as the matter in the libel be not changed;" and cited *Cro. Eliz.* 277. 1. *Leon.* 130. *Trenchen v. Metcalfe*, 1. *Jones*, 231. *Cro.*

(a) See 2. Stra. 1145.

(b) *Cro. Car.* 208. 2. *Brownl.* 247.

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against
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Car. 208. *Stroud v. Hopkins*, 1. Roll. Rep. 378. Carth. 463.
Poole v. Gardner.

LEE, Chief Justice. A prohibition must go; and then the defendant may either plead or demur to it, and may also take advantage of this exception.

WRIGHT, Justice. Here the custom has been found as set out, but held bad in matter of form only, and is according to the distinction laid down in *Stroud v. Hopkins*, Cro. Car. 208. The merits have never been determined, so that the plaintiff has not had the effect of his prohibition. The question should be determined by verdict, nonsuit, &c.

LEE, Chief Justice. If a person libel on a custom, he may proceed on it in the spiritual court, if it is admitted between the parties; but if the custom be insisted on by the one side, and denied by the other, a prohibition must go *pro defectu* of a trial in their court, for they can try it only by depositions, whereas it ought to be tried by a jury.

A prohibition was granted PER TOT. CUR.

Case 343.

Hayfman against Moon.

A devise to A. for life, with remainder to B. she paying to each of her sisters fool. conveys to A. an estate in fee.

WRIT OF ERROR to reverse a judgment given in the common pleas for the defendant on an ejectment.

A SPECIAL VERDICT found, that *Susannah Morley* being seised in fee of the premises in question devised them as follows: "As to my lands in C. I give them to my sister *Dame Mary Fagg* for her life; and after her decease to her youngest daughter *Susannah*, she paying to each of her sisters, *Elizabeth* and *Mary*, five hundred pounds a-piece (the survivor to take the whole); and if the said *Susannah* die before her mother, I will that the farm be equally divided between her two sisters *Elizabeth* and *Mary*; and if they all three die before their mother, I will it descend to the right heirs of my sister *Dame Mary Fagg* for ever." That the testatrix died; that *Sir John Fagg*, the husband of *Dame Mary*, entered in right of his wife; and that they had issue seven sons and three daughters, *Elizabeth*, *Mary*, and *Susannah*. *Susannah* died in the life-time of her mother *Dame Mary* without issue. *Mary*, another sister, married one *Spence*, and died also in the life-time of her mother, but left issue a son, who entered into a moiety on the death of *Dame Mary Fagg*. *Elizabeth*, the other sister, married one *Gall*, who also entered into a moiety in right of his wife, and levied a fine with *Elizabeth*, and died without issue.

The present ejectment was brought by the heir at law of *Elizabeth*, one of the daughters of *Dame Mary Fagg*, to whom the premises were devised on *Susannah's* dying before her mother *Dame Mary Fagg*, against the heir at law of *Sir Robert Fagg*, who was the eldest

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eldest son and right heir of *Dame Mary Fagg*, and also heir at law to the testatrix *Susannah Morley*.

The two questions were,

FIRST, Whether the two sisters *Elizabeth* and *Mary*, who survived their sister *Susannah*, took an estate in fee in common, or only an estate for life, by the will?

SECONDLY, Whether this ejectment is well brought for a moiety of the premises, or ought to have been brought for an undivided moiety?

THE COUNSEL for the plaintiff in error (the defendant in the ejectment) argued, that *Elizabeth* and *Mary* took only an estate for life; for that here are no words to carry a greater estate to them; and as they are not directed to pay any sum over, they can have no loss by not taking a greater estate than for life: that the testatrix's intention cannot prevail unless it be agreeable to the rules of law; and in this devise there are no words which, by the rules of law, will carry a greater estate to *Elizabeth* and *Mary* than for life (a): that the plaintiff is complete heir, being both heir at law to the testatrix, and right heir to *Dame Mary*, so as to take under the will, and therefore is not to be disinherited by ambiguous words, or by a constructive implication (b). It is plain from the last clause of the will, that the testatrix knew what words would pass a fee, for she has there made use of them. As therefore no such words are used in the devise to *Elizabeth* and *Mary*, it must be supposed she did not intend they should have so great an estate in the premises. And it is expressly said, that if all the daughters died before their mother, it should go over to another person; which shews the testatrix had no regard to their children; and it is observable, that no words of inheritance are used until after the devise to *Elizabeth* and *Mary*.

AS TO THE SECOND POINT, It does not appear that any partition was ever made of this estate; and therefore the ejectment ought to have been brought for the whole premises, or for an undivided moiety in general; for as it is now brought, it will be making a partition by ejectment, for the sheriff must put the plaintiff in possession of a moiety, and by that means will divide the estate, which cannot be done in this way (c).

THE COUNSEL for the defendant.—*Elizabeth* and *Mary* take an estate in fee. There are no precise words necessary to pass an estate by will, but the intention of the testator is principally to prevail; and that is to be collected from the whole of the will taken together, and is to

(a) Co. Lit. 9. b. 1. Roll. Abr. 834. pl. 11. 13. Dyer, 357. Cro. Car. 157. 988. Cro. Eliz. 52. 330. 497. 3. Leon. 190. Moore, 464.

(b) Vaugh. 262. 267. Dalison, 13. 2. Levin. 129. 194. 1. Cro. 52.

(c) Litt. "Tenants in Common." 1. Inst. 187. Litt. sect. 315. Cro. Eliz. 144. Savil. 28. Co. Lit. 199. b. Rast. Ent. 256. Co. Ent. 195. Hutt.

1. Lev. 34. 1. Inst. 32. Litt. sect. 44.

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receive a liberal construction; and the intention of the testator is to govern the words of the will as much as the strict rules of law are those of a conveyance. The testatrix shews, that she intended the premises in question for the benefit of her sister's daughters, and to prefer them before the son's; and of the daughters she intended the chief benefit to *Susannah* the youngest, to whom she first devised them, and directs her to pay five hundred pounds to each of her two sisters; but if *Susannah* die before she come to the possession of the estate (till which time the legacies of five hundred pounds each are not to be paid), then it is given to the other two sisters in lieu of their five hundred pounds. Now it is plain, the testatrix intended that *Elizabeth* and *Mary*, on the death of their sister *Susannah* before their mother, should have as great, if not a greater, benefit from this estate than they would have had if *Susannah* had survived their mother; and in that case they would be entitled to five hundred pounds a-piece absolutely, which would have gone to their children from their deaths. If therefore they should take only a life estate in these lands, they may be considerable losers by their sister's death, and will not have so great a benefit by the devise as if the five hundred pounds had been paid to them, which the testatrix could not intend. It is plain, that *Susannah*, had she taken, would have taken a fee, by its being directed that she should pay five hundred pounds to each of her sisters (a). And as *Elizabeth* and *Mary* take the estate instead of the five hundred pounds, it must be intended they should have as great an estate; for though the estate is not charged to them with the payment of any money, yet unless they have a fee, they may not receive so much from the estate as they would have done from the five hundred pounds a-piece, and in this sense may be losers by having the estate; but the law will always give such an estate to the devisee as is sufficient to support the purpose and intention for which the deviser devised it. Here then the testatrix intended the estate in lieu of the five hundred pounds a-piece; and unless they have a fee, it will not answer the testator's intention. So is *Shaw v. Weigh, Eq. Cases Abr.* 176. The heir at law is here excluded by express words, for it is particularly directed that he shall not have the estate unless all the three daughters died in the life-time of their mother, which has not happened (b).

AS TO THE SECOND POINT, The ejectment is well brought for a moiety only, for the plaintiff can recover only *pro tanto*; and the sheriff will deliver a moiety only on the execution, which will not amount to a partition.

LEE, Chief Justice, delivered the opinion of the Court. On this special verdict and will two questions have been made: FIRST, What estate *Susannah*, the youngest daughter of *Dame*

(a) 6. Co. 16. 3. Co. 20, 21. Rep. lowe, 56. Cro. Jac. 527. 2. Mod. 25. Cro. Eliz. 378. Cro. Jac. 599. Cro. Car. 158. et al.

(b) Moore, 127. 3. Mod. 45. 2. Show. 249. 1. Roll. Abrid. 843. 2. Ventr. 228. 1. Chan. Cases, 196.

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Mary Fagg, took by the will? SECONDLY, What estate *Elizabeth* and *Mary*, the two other sisters, took? And A THIRD QUESTION has been made on the verdict and judgment, that the judgment is to recover the term entirely, whereas they being tenants in common, it ought to have been for an undivided moiety.

As to THE FIRST QUESTION, We are all of opinion, that *Susannah* took an estate in fee. The premises are given to *Dame Mary* for life by express words, then to *Susannah*, paying to her sisters five hundred pounds a-piece, and on *Susannah's* death to be divided among the surviving sisters; and if all three died before their mother, then to the right heirs of *Dame Mary Fagg* for ever. *Susannah* being directed to pay a gross sum of five hundred pounds to her two sisters, the construction must be, that she should take an estate in fee, and upon this principle, that she may not have any loss by the devise, which she may have if she take only an estate for life. This has been so often settled, that it is not now to be disputed. In the case of *Read v. Hatton* (a) it is said, if there be a possibility of a loss, though a great improbability of one, it shall pass an estate in fee, where the devise is on paying a sum of money (b); and there is no case to the contrary, except one in *Dalison*, 13, 14. which is not law.

But this case was endeavoured to be distinguished from the common case of paying a sum of money, because here is a devise over; and in that case the first devisee shall not have a fee; and to this purpose was cited *Bacon v. Hill* (c), where a man devised a separate tenement to his three sons severally, and that if one or two of them died, his part should go to the survivor or survivors; and further, ten pounds to each of his three daughters, to be paid out of his land by every one of his sons; and it was held, that the sons should not have a fee-simple in their tenements; for although it be devised that everyone should pay a consideration, to wit, ten pounds, yet it being further limited, that after the death of every of them it should remain over, that shews his intent that the first devisee should have it for his life only, notwithstanding that limitation of the payment. And it was said, that this construction of a fee to *Susannah* was prevented by the direction, that if *Susannah* died the lands should go to the survivor of the sisters *Elizabeth* and *Mary*, so that *Susannah* was only a tenant for life. But I do not think that this case of *Baron v. Hill* is applicable to our case, because there was an express devise over after the deaths of the first devisees; but here it is, if all the three daughters die before their mother, then the

(a) 2. Mod. 25.

(b) See 1. Roll. Abr. 834. 2. Roll. Rep. 80. Dyer, 371. 6. Co. 16. Cro. Eliz. 204. 2. Vern. 106. Cro. Jac. 591. 599. Cro. Car. 196. Salk. 685. Pollexfen, 399. Cro. Eliz. 378. 2. Jones, 107. 2. Lev. 249. 1. Chan. Rep. 191. Hob. 65. 2. Show. 49. 3. Com. Dig. "Devise" (N. 4.). 2. Bac. Abr.

54. 3. Burr. 1535. 1542. 1. Black. Rep. 537. 2. Black. Rep. 1041. Cowp. 352. 833. Doe on the Demise of Pater-son v. Richards, 3. Term Rep. 356. Doe on the Demise of Baker v. Stocker, 5. Term Rep. 13. Andrews v. Stone-house, 5. Term Rep. 272. Moor v. Miller, 5. Term Rep. 538.

(c) Moor, 464. Cro. Eliz. 497.

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lands are to go over ; and it is not said, " if *Susannah* die " generally, but " if she die in the life-time of her mother : " and by the first part of the clause she has an estate in fee, and by the latter part it is a fee determinable on her dying in the life-time of her mother ; and in that case the legacies are not to be paid, because the lands never came to her.

AS TO THE SECOND QUESTION, What estate *Elizabeth* and *Mary* took ? We are all of opinion, that the truest construction, and the most agreeable to the intention of the testatrix, which ought to be complied with, is, that they took also an estate in fee, but determinable on their dying in the life-time of their mother. The estate is given to *Dame Mary Fagg* expressly for her life, which shews that the testatrix knew what words are necessary to pass an estate for life, which is a very material observation ; and therefore if a testator use proper words in one part of the will, the Court will conclude that he would have expressed himself in the same words in other parts of his will, if he intended to give the same estate ; and this was so held in *Shaw v. Bull* (a), before LORD TREYOR. Therefore, as the premises are not given to *Elizabeth* and *Mary* for life in express words, so there are no words which shew the testatrix intended they should have them for life only. Though there are not the same terms annexed to the estate given to *Elizabeth* and *Mary* as there are to *Susannah*'s estate, yet it is plainly given in lieu of the legacy of five hundred pounds a-piece, which they would have at their own disposal ; and it is most reasonable to think, that the testatrix intended they should have the same power over the estate as they would have had over the money. But if it be rested on that point alone, I should be in doubt whether that would be sufficient to give them an estate in fee or not ; but the following clause puts it beyond all doubt ; for there it is appointed at what time the estate shall descend to the heir of *Dame Mary*, to wit, if the daughters all die before their mother, then only it is that the heir is to take ; and this must happen previous to the land's descending to the heir. The plea of heirship cannot control the plain words of a will ; though I agree, no strained construction can be made in order to defeat the heir (b). But this is a necessary implication, and such a one, unless we determine against the intent of the will, we cannot help construing it an estate in fee in the daughters ; for if we were to determine that the daughters took an estate for life only, it would be saying that the heir of *Dame Mary* shall take the estate on the deaths of the daughters, though they survived their mother, when by the express words of the will it is not to descend to the heir of *Dame Mary*, unless the daughters died in the life-time of their mother. It is said, the heir shall not be disinherited by any implied intent, and only by express words. But then what intent is meant by this expression which is sufficient to disinherit an heir ? Why the Judges meant an intent arising on the words of the will, and such as may

(a) Mich. Term, 13. Will. 3.

(b) Denn, on the Demise of Gaskin, v. Gaskin, Cowp. 657.

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be called a logical necessity collected from propositions arising on the will itself. And this appears from the opinion of a great man in the case of *Willis v. Lucas* (a) : A testator devised land to his youngest son for life, paying a rent of ten pounds *per annum* to his eldest son ; and after the death of his said youngest son and *Mary* his wife, remainder to the first and other sons of the said youngest son ; and the question was between the heir at law of the testator and the wife of the youngest son, Whether she took an estate for life by implication ? or, Whether it was not to descend to the heir at law of the testator during the wife's life, as an estate undisposed of by the will, it not being to go to the son of the youngest son until after his and his wife's death ? and Lord Chancellor PARKER held, that the widow was entitled to the premises during her life by implication ; and he observed, that it had been admitted, that if the devise were to the heir after the death of the wife, in such case she would take by implication ; and that in this case it appeared to be equally the intention of the testator that his heir at law should not have the premises, and that they should not descend to him, for that the will, appointing that the heir should have a rent of ten pounds a-year out of the lands for his life, plainly implied that he should not have the land itself. This was a necessary implication from the will itself. So in *Higham v. Baker* (b), on a devise of a residue of lands to his youngest son and to the heirs of his body, after the death of his wife ; and another farm to his wife and youngest son to pay debts, and after the death of his wife to his son in fee ; it was held, that after the debts were paid the wife should have an entire estate for life, and then the son should have it in fee. These cases shew, that the implication must arise from the words of the will shewing the intention of the testator ; and the implication was held to be so strong, that, in both the cases, the wife was construed to have an estate for life. The rule is, that where all the words of the will may be satisfied without carrying the estate from the heir, he shall not be disinherited, for he is a favourite of the law ; but the Court must give the proper sense to every word, without rejecting anything ; and here the implication is necessary from the words of the will ; for if we were to construe in favour of the heir at law, these words " if all three of them die in the life-time of their mother " must be rejected as insignificant, and importing nothing. It is then said, that the heir in this case is not excluded by express words, and therefore cannot be said to be disinherited. I agree he is not disinherited positively, but it is expressly appointed at what time he shall take the estate, which implies a negative that he shall not take before that time comes, which will amount to a positive exclusion by express words. A question has been made, Whether, if the lands had been given to them expressly for life, that would have disinherited the heir ? It would not ; for if the words had been to them for life, they would have had no greater estate, and what had been undisposed of must have gone to the heir at law. But here

(a) 1. Peer. Wms. 472.

(b) Cro. Eliz. 15.

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the question is upon the meaning of this will and the event that has happened, that as all the daughters did not die in the life-time of the mother, whether anything is left to descend to the heir at law? A devise "to *A.*" without more words will not pass a fee, but if there are other words to shew for what special purpose the devise was intended, which required a greater estate, it shall be construed to pass a fee; as in *Benkew*, 15. pl. 19. *A.* reciting by his will that he was indebted in one hundred pounds to *B.* in consideration of *B.* releasing that sum to his executors devised the premises to *B.* without any more words, and died; and *B.* released the debt to the executors and entered; and it was held that *B.* took an estate in fee-simple in the lands. So in other instances, where it is necessary to accomplish the intention of the will, as in *Show v. Weigh (a)*, on a devise "to trustees and the survivor in trust for others for life and in fee," without saying "and to their heirs," it was held that they took an estate in fee, from the intent of the testator, by implication. And this shews, that if a greater estate is required to execute the will, a larger estate ought to be construed than is given by the express words of it. The question is, Whether in this case the intent is plain enough to construe a fee to all the sisters? The testatrix's first regard is to *Dame Mary Fagg*, her sister, who has an estate for life; next to *Susannah*, who would have taken a fee; then as to *Mary* and *Elizabeth*, if *Susannah* had survived her mother, they would have had five hundred pounds a-piece; and if *Susannah* died before them, and in the life-time of her mother, the farm is to be divided amongst the survivors; by this last clause they are to take an estate determinable on their dying in the life-time of their mother, and that by the special appointment of the testatrix; on which event it is to go to the heir of *Dame Mary*. It is difficult to find a case exactly in point, but it is most like that of *Purfoy v. Rogers (b)*; and though there is no judgment of the Court on this point, yet we have the opinion of *Saunders* upon it: The case was, the testator devised the inheritance of his lands and houses to *A.* after his mother's life; and if he die before he come to the age of twenty-one years, then he gave his inheritances of lands, after his wife's life, to his heirs for ever; and *Saunders* is of opinion that *A.* took a fee, because the testator appointed that if he died before the age of twenty-one years, the tenements should come to the right heirs of the devisor; which shews that the testator intended to give a fee to *A.* for if he intended only to give him an estate for life, what need had he to have directed that they should go to his right heirs after *A.*'s death within age? for the law would have directed the same, without the appointment of the devisor: and therefore when the devisor makes a special appointment in this manner, it must be intended that he meant to give a fee to *A.*; and *Saunders* thinks the words of the will may very well bear

(a) Easter Term, 1. Geo. 2. Eq. Cases Abr. 124.

(b) 2. Saund. 388. S. C. 1. Eq. Abr. 189. S. C. 2. Lev. 39.

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this construction. This case is like the present, only there it is a devise of the inheritances, and here of the farm; and *Saunders* thought it gave an estate in fee from the special appointment in the will at what time the heir should take: and it is on this latter part of the will we give our opinion, by which the heir is not to take the estate but upon all the daughters dying in the life-time of the mother.

As to THE THIRD OBJECTION, It appears the lessor of the plaintiff is entitled only to a moiety, and therefore it is said that the verdict ought to have been given for an undivided moiety, and the defendants found "not guilty" as to the rest. But I think there is no foundation for this objection. It does not appear by the verdict that the lessor of the plaintiff was tenant in common at the time of the demise; it is found, that the person under whom the lessor of the plaintiff claims, entered into a moiety; but it does not appear that the lessor of the plaintiff was tenant in common at the time of the demise, for there might be an agreement between the two sisters to part it; and we must not conclude they are now tenants in common, because they were once so; but if they were so, there would be no foundation for the objection. Tenants in common are they who hold by several titles, or by one title on several rights; and they have several freeholds, and their right is several; and an action may be brought by one tenant in common against the other for a moiety. If one tenant in common is ousted, the other may have an ejectment against his companion or a stranger for a moiety. They cannot make one joint lease, but in an ejectment they must declare on several leases of their several parts. They have several rights, and an ejectment is an action which concerns the right. If a lease be made to two, and one make a lease of his moiety, the lessee is tenant in common with the other. And I do not think that this judgment will make any partition or severalty between them; for it was held in *Morrice's Case* (a), that in an assise a judgment in severalty between joint-tenants is wrong; and in this case, on a recovery of a moiety, the person recovering will be in the same place and condition with the person recovered from, and will hold in common with the other.

We are, therefore, all of opinion, that this is a right judgment which is given in the common pleas.

The judgment was affirmed.

(c) 6 Co. 15.

Godman

Case 344.

Godman against Morley.

Horse-racing is gaming within the penalties of the statutes

16. Car. 2. c. 7.

and 9. Ann.

c. 14.

S. C. 2. Stra.

1159.

2. Show. 36.

2. Wilf. 36. 309.

4. Burr. 2432.

Cowp. 281.

3. Term Rep.

706.

4. Term Rep. 1.

2. Hawk. P. C.

7th edit.

AN ACTION ON THE CASE for fifteen pounds won at a horse-race; and on *non assumpsit* pleaded, a question was made at the assizes, Whether horse-racing (*a*) was within the 9. Ann. c. 14.? If so, the plaintiff cannot recover the fifteen pounds.

The PLAINTIFF'S COUNSEL insisted, that it could not be within the 9. Ann. c. 14. for several games are mentioned there, but horse-racing is not one of them; and it cannot be within the 16. Car. 2. c. 7. for that is only where the sum is one hundred pounds or upwards, whereas this is only fifteen pounds.

The DEFENDANT'S COUNSEL contended, that though it was not within the very words of the 9. Ann. c. 14. yet it was within the meaning of that act, and within the words of the 16. Car. 2. c. 7.: the statute of Car. 2. includes only one hundred pounds or more won at the games there mentioned, but the statute of Anne takes in all above ten pounds, and after having mentioned several games by way of example says, "or other game or games whatsoever." Therefore we must look back to the 16. Car. 2. and by that statute horse-racing is particularly mentioned as a game which the act intended to guard against; so that as to the sum won, the plaintiff is within the 9. Ann.; and as to the game, he is within the 16. Car. 2. expressly; and he cited *Kate v. Collings* (*b*), where the Court inclined to think that horse-racing was within the statute, but gave no positive opinion.

LEE, Chief Justice. It is certainly a good rule which has been laid down to extend these statutes against gaming as far as may be. The statute of 9. Ann. c. 14. does not particularize so many sorts of games as the statute of 16. Car. 2. c. 7. but this latter statute seems necessary to be considered in order to determine what is meant by "game." It recites the many inconveniencies which attend gaming for money, and mentions horse-racing particularly, which it considers as a game; and in giving some directions in the third section it says, "any one playing at the said games." There are very strong words in the 9. Ann. which take in the same games as are mentioned in the 16. Car. 2. And in the case of *Kate v. Collings* I remember THE CHIEF JUSTICE thought that horse-racing was included in the 9. Ann.; and I am of that opinion, that horse-racing is such a game as is included in the statute of Anne.

CHAPPLE, Justice. The inconveniencies which attend gaming at horse-races seem as great as at any other games. And I am of the same opinion.

(a) It is said in the Italic notes of Mr. Nolan's edition of Strange, "the wager was that the mare of B. beat the defendant's mare." 2. Stra. 1159.

(b) Trinity Term, 6. & 7. Geo. 2.

WRIGHT, *Justice*. The statute of 23. Hen. 8. c. 2. does not mention cock-fighting, but in 2. Show. 36. it was held, that cock-fighting is an unlawful game within that act, as it is particularly mentioned by the statute of 16. Car. 2. Here the words are "or any other game whatsoever." Betting is of itself gaming, be it at any diversion; and I think that gaming at a horse-race is as much so as at a bazard table.

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against
MORLEY.

Judgment for the defendant (a).

(a) But now by 13. Geo. 2. c. 19. horse-racing is allowed under the regulation described in the act.

Oates against Jackson.

Case 345.

THIS is AN ACTION OF TRESPASS AND EJECTMENT, in which the plaintiff declared, that *Elizabeth Hattersley*, on the first of *October*, in the thirteenth year of *George the Second*, demised sixty acres, &c. to the plaintiff, to hold to him and his assigns for seven years, &c. by force whereof he entered, and was possessed until the defendant entered and ejected him. To this the defendant pleaded the general issue; and at the last assizes at *York* a case was made for the opinion of the Court.

The case stated, that *Ralph Clay* was seised in fee of five closes of meadow, and other the premises in the declaration mentioned, and by his will, dated the eighth of *January* 1693, devised the premises in the words following: "As for touching and concerning the five closes of meadow called *Woofspark*, I give, devise, and bequeath them to *Annabell* my loving wife for and during the term of her natural life, and from and after her decease then I give and bequeath the said closes, lands, and premises to *Isabella Addingham*, my daughter, and to the children of her body, begotten or to be begotten by *William Addingham*, and to their heirs for ever."

In *April* 1694 the testator died seised of the premises, without making any alteration in his will: on his death *Annabell* his wife entered, and continued in possession until her death, which happened the fifteenth of *August* 1698. *Isabella*, at the time of making the will, had, by the said *William Addingham* her husband, a daughter named *Elizabeth*, and after the making the said will had several other children by the said *William Addingham*, viz. a daughter *Isabel*, born soon after the testator's death, who died without issue; and several others, all of whom died without issue, except *Elizabeth*, (the daughter of *Isabella Hattersley*, the daughter born at the time of making the will) who died in 1711 without issue. *Annabella* married *Thomas Hattersley*, who died the ninth of *March* 1729, leaving issue a daughter, *Elizabeth Hattersley*, the lessor of the plaintiff. The testatrix's daughter entered into possession of the premises after the death of her mother, to whom they were devised for life. Soon after

On a devise "to
" A. for life,
" and after her
" death to B.
" and to the
" children of
" her body be-
" gotten or to be
" begotten by C.
" her husband,
" and to their
" heirs for
" ever;" if one
child be born at
the time of the
testator's de-
cease, this cre-
ates a jointenancy
between B. and
her children.

S. C. 2. Stra.
1172.

3. Com. Dig.
"Devise"

(N. 8.).
Fearn on Cont.
Rem. 4. edit.
462.
8. Viner Abr.
239.
5. Term Rep.
324.

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after the husband died, and she married *Matthew Jackson*, by whom she had issue *Matthew Jackson* the defendant, her heir at law. *Isabella* married, survived all her children by her first husband, and died the eleventh of July 1739 in possession of the premises; and on her death *Matthew Jackson*, her son, entered, against whom this ejectment is brought by this *Elizabeth Hattersley*. *Matthew Jackson* the defendant's title is as heir at law to his mother *Isabella*. *Elizabeth Hattersley*, who is lessor of the plaintiff, derives her title as grand-daughter to *Isabella Addingham*, that is to say, daughter of *Annabella Hattersley*, who was the only child of the said *Isabella*, by *William Addingham* her husband, that had issue.

The point reserved for the opinion of this Court is, What estate in the premises passes by the will to *Isabella* the testatrix's daughter, and to her children?

DENISON for the plaintiff. There is but one way of construction that can serve the defendant's purpose; and that is, that *Isabella* took an estate of inheritance in fee-simple, for without such estate the defendant can have no title; on the other hand, if *Isabella* by the will took an estate in special tail, then the right to the premises is in her grand-daughter *Elizabeth Hattersley*, the lessor of the plaintiff, as heir in special tail; or if the fee was in the children of *Isabella*, the lessor of the plaintiff, even in that case, has a good title.

FIRST, I shall consider whether this limitation in the will "to *Isabella*, and the children of her body begotten or to be begotten by *William Addingham*," does not create an estate tail in *Isabella*, because this seems to be the most natural construction of this will. It must be observed, that at the time of making the will *Isabella* had one child living, named *Elizabeth*, and all the other children of *Isabella* were born after the death of the testator, and on this accident it hath been thought by some that this case is similar to *Wild's Case* (a). But notwithstanding *Isabella* had a child born when the will was made, yet this case differs very greatly from *Wild's Case*. As to that case, I own the principal case there hath been always allowed to be law, though some other matters in it have been often doubted by some. I will state the principal case there, and compare the present case with it. In that case, lands were given to *A.* for life, remainder to *B.* and the heirs of his body, the remainder to *Rowland Wild* and his wife, and after their decease to their children; *Rowland* and his wife had then living a son and a daughter; and the Court were of opinion, that *Rowland* and his wife could have no estate tail by construction; because, they say, had it been in a conveyance, it would have been only an estate for life; and as his intention did not appear to have it take effect contrary to the rule of the law, therefore they were of opinion that *Rowland* and his wife had no estate for life, remainder over to their chil-

(a) 6 Co. 16.

dren then born. This *Cafe of Wild* is taken notice of by my LORD HALE in 1. *Vent.* 231. and he gives this account of it: He says, the reason why it was held there to be an estate for life in *Wild* and his wife was, first, because having limited a remainder in tail to *B.* by exprefs words, that is to say, "to *B.* and the heirs of "his body," if he had meant the same estate in the second remainder, it is likely he would have used the same words: secondly, it was not "after their decease to the children of their bodies;" for if so, there would have been an eye of an estate tail, that is, it would have looked like an estate tail; now, in our case, the devise is "to the "children of her body begotten:" thirdly, the principal reason was, because there were children in being at the time of the devise. I observe, in the first place, that this *Cafe of Wild* is a great while ago, and the Court then had not gone so largely into the consideration how far the word "children" might be a word of limitation; and therefore in *Wild's Cafe* there being a son and a daughter living, and no intention appearing that the testator intended any other than an estate for life in the children, the Court would not extend the construction any farther than what was agreeable to the rules of law; and it is agreed in *Wild's Cafe*, that if it had been limited "to the children of their bodies," it would have been an estate tail. And the case in 1. *And.* 49. proves it; there the devise was "to *William* the son for life, and after his death to the men "children of his body," and there it is held to be an estate tail: and though my LORD COKE says, for he cites this case in *Wild's Cafe*, that it did not appear that the testator had any issue male living at the time of the devise, and therefore for that reason it was adjudged an estate tail; yet on looking into the report of the case in 1. *And.* 43. and *Moor.* 397. there is not any notice taken of this thing, or anything that shews that this was the reason of the judgment; nor any distinction in the Books whether there were or were not children living at the time of making the will: and certainly the words "men children of his body" will include all the children; and therefore whether he had or had not children at the time of making the will could raise no difference. And it seems that HALE, in the case of *King v. Mellin*, argues from the manner of limitation being "to the children of the body" or "issue of the body begotten," which, says he, are phrases agreeable to an estate tail. The word "children" in this will is a word of limitation; for the words "heirs," "issue," or "children," in a will, are sometimes words of limitation and sometimes words of purchase, but they are one or the other merely to answer the intention of the testator. The words "heirs," or "heirs male," naturally and *ex vi termini*, in legal construction, are words of limitation, and yet sometimes in wills are words of purchase: that is proved by *Archer's Cafe*, 1. *Co. Rep.* So the word "issue" is sometimes used as a word of limitation, as in the case of *King v. Mellin*; and sometimes it is used as a word of purchase, as in the case of *Backhouse v. Wells*; and so the word "children," in *Wild's Cafe*, is used as a word of purchase; and yet it is there agreed that

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1. Eq. Abr. 181.
3. Keb. 42. 52.
- 95.
1. Vent. 214.
- 225.
2. Lev. 58.
3. Salk. 296.
- Pollexf. 101.

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it might be a word of limitation. If the devise had been to *Isabella*, and her children "on her body begotten by her husband," without going further, it would have been clearly an estate tail in *Isabella*.

SECONDLY, The next consideration will be, whether these additional words of limitation, "and to their heirs for ever," grafted on the other words in the will, "to the children of her body begotten," shew that these words cannot be considered as words of limitation but as words of purchase. Possibly it may be said to be like the case of *Backhouse v. Walls* (a), where the limitation was "to *John Barber* for life only, and after his decease to his issue male, and the heirs male of such issue male;" but in that case there was an express devise for life, and the next limitation "to the heir male or issue male," which was taken in that case to be *nomen singulare*, and to be words of purchase by reason of the additional words annexed to them. But in the present case the limitation is not "to *Isabella* for life, and after her decease to her children," but it is "to *Isabella* and the children of her body," which therefore cannot be taken to be words of purchase, but must be taken to be words of limitation; and the subsequent words, "and to their heirs," do not make any alteration, or enlarge the estate first given, but by the word "heirs" must be intended such heirs as were capable of taking under the limitation in tail, that so the will may be consistent. And this construction is not a new one, but it has been held in other instances, that limitations of this kind have not been taken to enlarge the estate, but that the word "heirs" has been taken in a limited sense. There are cases to shew that the word "heirs" is not always to be taken generally, but with reference to the precedent words; as in *Moor*, 124. lands were devised to one and the heirs male of his body, and if he die without heirs of his body, that the lands should remain to a stranger; and it was adjudged that the words "heirs of the body," in the condition, shall not enlarge the precedent estate in tail male, but shall be referred to it: and it is so laid down as a rule in 1. Co. 104. Therefore in the present case *Isabella* had an estate tail by the first point of the limitation; and if so, then those latter words "and to their heirs" will not make any alteration or enlarge the estate; and therefore these subsequent words must be considered agreeable to the limitation in tail, and the words "their heirs" must mean such heirs as were capable of inheriting by the tail. The case of *Goodright v. Pulling* (b) was, that *Nicholas Lise* by will devised lands to his wife for her life, and after her decease then to his kinsman *Nicholas L.* during his life, and after his decease then to his heirs male of the body of his kinsman *N. L.* to be begotten, and to his heirs for ever; then the will went on with other immaterial

(a) 1. Eq. Abr. 184. 2. Ld. Ray. (b) Mich. Term, 15. Geo. 1. 1. Bar.
1439. 2. Mod. 262. 10. Mod. 186. K. B. 6. 2. Eq. Abr. 315. 2. Ld.
Fort. 450. Gilb. 20. S. C. cited 2. Stra. Ray. 1437. 2. Sara. 729.
731.

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limitations; and the question was, What estate *N. L.* had? and the Court were of opinion that this was an estate tail in *N. L.* by reason of the limitation to "the heirs male of his body," and that the words "his heirs for ever" made no alteration at all. The only difference between that and the present case is, that the limitation there is "to the heirs males of the body of *N.* and his heirs for ever," and here it is "to the children of the body begotten by *William Addingham*, and to their heirs for ever;" and the word "children" can make no material alteration in construction, because "the children of the body" in a will, are the same as "heirs of the body" in a deed; therefore the present case is in effect the same as if the premises had been limited in a deed "to *Mabella* and to the heirs of her body begotten by *William Addingham*," in which case the additional words "and to his heirs for ever," would make no alteration (*a*); and there is no more reason why the addition of these words "and to his heirs for ever," in this case, should make any more alteration than they did in the case of *Goodright v. Pulling*, in which case it was determined that they did not make any alteration at all (*b*). It is impossible the testator ever could intend to devise his estate to *Elizabeth*, who was the only child then born; for first she speaks of "children" in the plural number; but the stronger reason is, that she never intended to exclude the after-born children. But if this word "children" be considered as a word of purchase, then *Elizabeth* being the only child then born, she only could take by purchase; and the consequence would be, that all the other children after-born would be excluded from taking under the will, and the estate would go to the heirs general of the child then living: this construction can never be imagined to be agreeable to the intention of the testator. This inconvenient construction was the real ground of the opinion of LORD HALE in the case of *King v. Melling* (*c*); he observed there that the estate was given "to *Barnard* for life, and after his decease to the issue of his body lawfully begotten on a second wife," and for want of such issue there was as much reason to provide for the issue of *Barnard's* issue as for the first issue; and because the testator intended that the estate should not go over to *John Melling* so long as there was any issue of *Barnard*, therefore the intention of the testator was over-balanced by that, and therefore it was held that *Barnard* had an estate tail. So here if the word "children" be considered as a word of purchase, the estate would vest in *Elizabeth* only, and it would go to her heirs general, and all the other children would be excluded. This inconvenience was likewise considered in the case of *Goodright v. Pulling*.

(a) See also *Legate v. Sewell*, 1. Peer. Wms. 37. *Morris v. Legay*, 2. Burr. 1102. *Minshall v. Minshall*, 1. Atk. 411. *Wright v. Pearson*, *Fearne C. R.* 137. Amb. 358. *King v. Burchell*, 4. Term Rep. 296. *Denn v. Perehey*, 3. Term Rep. 299.

(b) See *Blandford v. Aplin*, 4. Term Rep. 82.

(c) 1. Eq. Abr. 181. 3. Keb. 42. 58. 95. 1. Vent. 214. 225. 2. Lev. 58. 3. Salk. 296. Pollexf. 101. Lev. Ent. 98.

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Thus far I have considered the devise as limiting an estate tail to *Isabella*; and if this be right, then the lessor of the plaintiff has a good title as heir in special tail. But in order to make out the title under the will to be out of the lessor of the plaintiff and in the defendant, it has been conceived by some that *Isabella* and her child, who was born at the time of making the will, take a joint estate in fee, and consequently *Isabella* having survived her daughter *Elizabeth*, the inheritance of the whole estate has vested in her in fee. This construction is already answered by considering the inconveniences arising from the supposition that this word "children" is to be considered as a word of purchase: but in the case of *Cook v. Cook* (a), where a devise was to the issue of J. S. who then had a daughter living and afterwards had a son born, the then LORD KEEPER was of opinion that all the children should take, and even grand-children if there had been any; and although upon the death of the testator there was then only a daughter born, yet upon the birth of another child the estate shall open and take in the after-born son. Then on this way of construing the will the inheritance being in the children of *Isabella* begotten by *William Addingham*, the lessor of the plaintiff, who claims as the only surviving grand-child of that marriage, has a good title. But it is objected, that this is a joint estate in *Isabella* and her children; the consequence of which is, that this estate would go to the heirs general of *Isabella* by an after-taken husband, and this would defeat the intention of the testator; for the issue of that very marriage, which the testator by his will was providing for, would be cut off by this construction; for *Isabella* married again, and the now defendant is the son of that second marriage: therefore upon the whole it must be submitted, that whatever construction is made of the will, the lessor of the plaintiff has a good title as heir in tail; or if, by reason of these additional words, "and to their heirs," it is not an estate tail, even in that case the inheritance being limited to the children, the lessor of the plaintiff has a good title.

BOOTLE, Serjeant, on the other side, after having stated the case as above, said, that MR. DENNISON had in vain endeavoured to distinguish this case from *Wild's Case* (b), having cited no case to make out this distinction, but only said, that that case was of a long standing, and that the law was now altered. But it is impossible to construe this to be an estate-tail in *Isabella*, as it appears there were children living at the time of making the will, for such a construction would overthrow many resolutions in the Books; and the authority of *Wild's Case* in this point was never questioned; the words of the Book are as full and strong as possible to this purpose, and are against MR. DENNISON's construction. The words are these, "If A. deviseth lands to B. and to his children or issues, and

(a) 1. Vern. 545.

(b) 1. Eq. Abr. 131. 6. Co. 16. Moor, 397.

he

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"he hath not any issue at the time of the devise, that the same is an estate tail, for the intent of the deviser is manifest and certain, that his children or issues should take; and as immediate devisees they cannot take, because they are not *in rerum natura*; and by way of remainder they cannot take, for it was not his intention, for the gift is immediate. But if a man devise lands to A. and to his children or issues, and they then have issues of their bodies, there his express intent may take effect according to the rule of the common law; and no manifest and certain intent appears in the will to the contrary; and therefore in such case they will have but a joint estate for their lives." From hence it appears, that the word "children" in the present case, according to this resolution, cannot be considered as a word of limitation, because it is directly contrary to the rule of law, as stated here, that children living at the time of making the will should take by way of limitation. Since then the word "children," in the present case, must be taken to be a word of purchase, it follows that the subsequent words, "and to their heirs for ever," must give a joint estate in fee. I shall therefore contend, FIRST, That the mother and her children took an estate in fee as jointenants. Lord Coke (a) is express, that where B. having divers sons and daughters, A. giveth lands "to B. et liberis suis, and to their heirs," the father and all the children do take in fee simple jointly, by force of these words; and "their heirs for ever" make it a joint estate in fee; and these words, "on the body of her begotten, or to be begotten, by William Addingham," shall only be considered as a description of what children shall take; and the children born after the death of the testator shall take jointly with their mother and the children born in the life of the testator, for on the birth of other children the estate shall open and take in such after-born children. This is the natural construction to be put on the words of this will, and by this all the words of the will are taken in and will be answered; and there is no occasion to reject any of them, but they are all taken, and consistent with the rules of law. For this purpose I shall cite the case of *Cooke v. Cooke* (b), which Mr. DENNISON mentioned for another purpose. There the devise was to the issue of J. S. who then had a daughter living, and afterwards had a son born; and the question was, Who shall take, and what estate? and THE LORD KEEPER was of opinion, that all the children should take, and even grandchildren if there had been any; but they shall take only an estate for life; and although the devise is to the issue begotten, that makes no difference; the words "begotten and to be begotten" are the same, as well upon the construction of wills as settlements, and take in all the issue after-begotten; and although upon the death of the testator there was only a daughter born, yet upon the birth of another child the estate shall open and take in the after-born son. But he makes a distinction of a personal estate; for by a devise of that "to a man and his children," a child born

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after the death of the testator shall not take ; and there he also puts this case : A devise "to the issue of B. and for want of such issue "to C. D." having a son and a daughter, they shall take only as persons described, and have only an estate for life, although the subsequent words "for want of such issue" seem to imply an estate tail. The only difference between this case in *Vernon* and the case now before the Court is this, that the devise there was "to the "issue of J. S." and there was only one child living and another child born afterwards ; and it was held, that they should take a joint estate for life ; here the devise is, "to *Isabella* and to her "children on her body begotten, or to be begotten, by W. A." And these last words are only descriptive ; and therefore it would have been the same thing if the testator had only said "to her and her "children." The only difference therefore between these cases is, that in the case in *Vernon* the word "issue" is used, and in the present case the words are, "and to her children." Now "issue" hath been held to be more respective than the word "children ;" for "issue" will take in grandchildren, but "children" will not ; that is determined in *Tyler's Case* (a). Now this being so, then I ask, How this case now before the Court can be distinguished from that case of *Cooke v. Cooke* ? Here the devise is, "to *Isabella* and "to her children ;" and there being a child then born, it is impossible that this, according to the construction of law, can be an estate tail in *Isabella*, but the estate vested in the mother and the children there born ; and when the after-children were born, the estate opened and let them in. That an estate may open on a contingency, is no new thing ; for in the case of *Puresfoy v. Rogers* (b), THE CHIEF JUSTICE held, that true it is where an estate *in esse* and a contingent remainder with a remainder over to him who hath the first estate *in esse* are limited by one and the same conveyance (and here they are by the same will), there the remainder *in esse* shall vest till the contingent remainder come *in esse*, and then the estates shall open and disjoin to let in the contingent remainder, because they were all created by the same conveyance ; and therefore the estates shall open and disjoin, as they are appointed by the original conveyance. As to the cases that have been cited to prove it an estate tail in *Isabella*, there is not any one case where the children were living at the time of making the will. MR. DENNISON has not put any one case where the limitation was to the devisee and his children, and the children were living at the time of making the will ; and this case turns on that ; and to get over that distinction must overturn the resolution in *Wild's Case*, which is express, that where there are children living at the time of the devise, it cannot be an estate tail ; and if the testator did intend it so, yet the law will supervene his intention. *Wild's Case* is expressly, that it cannot be an estate tail ; and if it cannot be an estate tail, then I submit it that it can operate in no other way but in the manner I have put it ; and it must be considered as a joint

(a)

(b) 1. Eq. Abr. 189. 2. Saund. 380. 2. Lev. 39. 3. Kob. 11. estate

estate in the mother and in the children; and the limitation to their heirs for ever makes it an estate in fee. This is the only point that I rest it on; and the case in *Vernon* is an express authority for me; and for these reasons I submit it, that the lessor of the plaintiff hath no title.

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MR. DENNISON in his reply said, that he had always understood that the case of *Cooke v. Cooke* had been often denied on the other side THE HALL.

But BUTTLE, Serjeant, insisted, that it had been always allowed, and that it had been cited and relied on in the case of *Glenorchy v. Bosville* (a).

LEE, Chief Justice. This case appears to me to be a case of a good deal of difficulty upon the construction of this will. The construction MR. DENNISON puts on it, if the rules of law will admit it, seems to be that which best answers the intention of the testator; for undoubtedly he intended this estate as a provision for his wife, and after her death for *Isabella* his daughter and her issue by *William Addingham*; consequently, either of the constructions put upon the will by MR. DENNISON will answer that intention. On the other side, my BROTHER BUTTLE's construction, grounded on the cases that have been cited, does certainly defeat that intention; for by his construction the estate must have been carried away from the children of *Isabella* by *William Addingham* to the child she hath had by a second husband. But however, if the authorities and rules of law require it, we must put this construction on it. But if MR. DENNISON's construction could be maintained on the foot of the resolutions that have been cited, that would be the construction that would best answer the intention of the testator, by giving *Isabella* an estate tail; and by these latter words, "and to their heirs," to confine them to such heirs as are before mentioned, that is, "the heirs of her body." But certainly if an estate be given "to one and to her children," she having children at that time, it will be a joint estate in the mother and her children, that is certain. What is there then to distinguish this from the present case? It appears there was only one child in being at the time of the devise. Take it then according to the case of *Cooke v. Cooke* (which there seems to be a good foundation for); taking it, that where there is a child in being at the time of the devise, and other children are born afterwards, that the children born after shall be admitted to take; that precedent shews, that under the description of a devise "to children," not only children then in being, but also children born afterwards, must be considered as existing, because the estate opens to let in these subsequent-born children; which seems to speak strongly; for that expression of a devise to "children" imports the same thing as if all the children were born at the time of the devise. If lands be devised for life, the remainder to the right heirs of *J. S.*, and of *J. H.* and *J. S.* hath issue and dieth, and afterwards

(a) Cases T. T. 3.

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J. H. hath issue and dieth, the issues are not jointenants, because the one moiety vested at one time and the other moiety vested at another time (*a*). SERJEANT BOOTLE says, that it was mentioned that they were jointenants; but whether that was on an accurate consideration, will be a matter of further consideration on a future argument. It may be also a matter of consideration how repugnant this construction is to what seems to be very strongly the intention of the testator; and whether these words, "and to their heirs," may not in point of construction be restrained to the children only, without carrying it to the mother as well as to the children; and if so, then she will have an estate for life only. I do not mean to give any opinion; these are matters that appear to have difficulty in them; I mention them only that THE BAR may take notice of them hereafter.

WRIGHT, *Justice*. Though MR. DENNISON's construction would best answer the intention of the testator, as the case now stands, because it hath happened that *Elizabeth* the daughter is dead without making any alteration in the estate tail; yet taking it as it stood at the time of making the will, then the construction MR. DENNISON contends for would put it in the power of the daughter to deprive the children of the estate. But taking it according to SERJEANT BOOTLE's construction, that she and the children took a joint estate in fee, then the testator did not give the mother the whole estate, but he gave the children an immediate provision, and never put it into the mother's power to defeat them of it; and it is merely by the accident of survivorship that she takes the whole estate. *Wila's Case* is extremely strong; and as to the manner of their taking, I think the children take as jointenants; and I apprehend that the children are considered as if they were all *in esse* at the time of making the will. I would not be understood to give any opinion at all, but only to take notice, that though by accident MR. DENNISON's construction will best answer the intention of the testator, yet it seems, at the time of making the will it would not better answer the intention than that other construction.

LEE, *Chief Justice*. I remember *Co. Lit.* in the chapter of "*Jointenants*" states, that where the persons take by the same title, yet taking at different times, they shall not be jointenants, except in one case put of a feoffment made by a man to the use of himself and of such wife as he should afterwards marry for the term of their lives, and after he taketh a wife, in that one instance they are jointenants, and yet come to their estates at several times. This is a matter that I think deserves further consideration.

LEE, *Chief Justice*, in *Michaelmas Term*, in the sixteenth year of *George the Second*, delivered the opinion of the Court in this case; and after having stated the case to the same effect as THE COUNSEL had done on the former arguments, he said, The question in this case for the consideration of the Court is, What

(*) *Co. Lit.* 123.

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estate or estates pass by the will of *R. Clayton* to *Isabella* his daughter and to her children? The lands in question are by the testator devised to his wife *Annabella* for and during the term of her natural life; and after her decease to his daughter *Isabella Addingham*, and to the children of her body begotten or to be begotten by *William Addingham*, and to their heirs for ever. It appears by this state of the case, that at the time of making the will *Isabella Addingham* had issue by *William Addingham* one daughter, called *Elizabeth*; and the question is, What estate passed by the will to *Isabella* the daughter, and to the children of her body begotten or to be begotten by *William Addingham*? On the former argument it was insisted on for the plaintiff, who claims as heir at law to the youngest daughter of *Isabella*, that *Isabella* took an estate for life only, and that the daughter took the remainder in fee under the devise to *Isabella* and to her children begotten or to be begotten, and to their heirs. But as to this there is nothing in the will from which it can be inferred that this was the intention of the devisor, but the contrary; because in another part of the will, where he intended to give an estate for life only, he has given it in express terms to his wife "for and during the term of her natural life;" but he hath not so expressed himself in that clause of the will in which he deviseth his estate to his daughter. And as to this the case in *Co. Lit. 9.* seems to be very strong: the words of the Book are, "*B. having divers sons and daughters, A. giveth lands to B. et liberis suis, and to their heirs;*" the father and all his children take a fee-simple jointly, by force of these words "their heirs." But it was endeavoured to consider this case in a different light, by restraining these words "and to their heirs" to the children only; and therefore it was said, that only an estate for life was vested in the mother, and that the fee was given to the children, because the words "their heirs" were to be restrained and referred only to the children: but this is contrary to *Co. Litt.*; for according to the case above mentioned, they all take an estate in fee jointly. It is true, it is taken notice of in that case, *Co. Lit. 9.* that if he to whom the feoffment was there made had had no children at the time of the feoffment, the children born afterwards should not have taken. But that observation will not affect the present case, because it is stated that there was a child, and therefore such child may take under the expression of "children;" for so in the case of *2. Ver. 108.* there the sum of fifteen hundred pounds was devised to the children of *A.* who had only one child; and it was held, that a child should take this money by this description: and if this be so, then in this way of considering the case, by the devise "to *Isabella* and to her children begotten or to be begotten by *William Addingham*" a fee passeth to *Isabella* and the child she then had jointly, and consequently *Isabella* surviving that child had a fee in her; and as to the defendant, it is immaterial whether the children born after the testator's death can be let in to take or not, because *Isabella* survived them also. Therefore here is a plain title in the defendant, as heir at law to *Isabella*, in whom the fee vested by survivorship.

Judgment was accordingly given for the defendant.

Case 345*.

Chefton against Crawley.

A writ of enquiry, though executed by thirteen jurors, is good.

A WRIT OF ENQUIRY was executed by thirteen jurors. A motion was made to set the inquisition aside, on the ground that this number was illegal, a jury being confined to twelve persons only.

S. C. 2. Stra.
1159.

FORD opposed this motion, and cited the case of *Finch v. King (a)*, where an enquiry was executed by thirteen jurors, and held good on a writ of error.

THE COURT, after consideration, held that the writ was well executed, for that such a writ may be executed by any number of jurors more, though not less, than twelve, for it is only an inquest of office (b).

(a) 2. Roll. Abr. 673.

(b) See Cook v. Beale, 1. Ld. Rav.

176. Beardmore v. Carrington, 2. Will.

243. Eichorer v. Le Maitre, 2. Will.

368. Hewit v. Mantel, 2. Will. 374.

Bruce v. Rawlings, 3. Will. 62. See

also 1. Tidd's Practice, 314.

MICHAELMAS TERM,

The Sixteenth of George the Second,

I N

The Common Pleas.

Sir John Willes, *Knt. Chief Justice.*Sir William Fortescue, *Knt.*Sir Thomas Parker, *Knt.*Sir Thomas Burnett, *Knt.*} *Justices.*Sir Dudley Ryder, *Knt. Attorney General,*Sir John Strange, *Knt. Solicitor General.*

Fisher against Kitchenman.

Case 346.

ACTION ON THE CASE on a special agreement, which was, *The postea and nisi prius roll sufficient evidence to prove that a cause came downtobe tried, and that a juror was withdrawn.*

"that whereas a suit was then depending concerning a cock-match between the plaintiff and one A. the defendant agreed to pay the plaintiff the fifth part of the expences of such suit."

The declaration having set forth the nature of the agreement, takes notice briefly, that an action had been depending between A. and the plaintiff concerning this cock-match, and that such proceedings were had thereon that issue was joined; that the cause came down to be tried at the assizes; that a juror was withdrawn, and the cause referred to arbitration by consent of parties: then the plaintiff avers that he expended in the prosecution of the suit two hundred and fifty pounds, of which the defendant's part amounted to fifty pounds, but that he refused to pay it to the plaintiff *prout agreement, per quod, &c.* The defendant pleaded that he made no such promise, on which the parties were at issue.

S C. a. Barnes, 230. 355.

FISHER
against
KITCHENMAN.

The plaintiff, after proving the agreement, in order to prove the prosecution of the suit between him and *A.* that it came down to be tried at the assizes, and that a juror was withdrawn, and the matter referred to arbitration, produced in evidence the *nisi prius* roll, and the *poslea* indorsed on it by the associate, who swore that it had not been out of his custody since the trial.

The defendant objected, that this was no good evidence of the proceedings in the former action, and that a copy of the proceedings which were recorded on the rolls of the court ought to have been produced.

MR. JUSTICE BURNETT, who made this report and tried the cause, said, he was of opinion that as the *nisi prius* roll was signed and sealed by the treasurer, who by his office was the proper person for it, and was by law intrusted with the seal of the Chief Justice, it was a sufficient evidence of the original record and proceedings in this court as to this point, and therefore admitted it to be read, but that he reserved the point for the opinion of the Court.

BOOTLE, *Serjeant*, for the plaintiff, cited the case of *The King v. Eyles*, before HARDWICKE, *Chief Justice*, in the fourth year of *George the Second*, where, in an indictment for perjury, the indictment set forth that there was a cause depending between *A.* and *B.* and that such proceedings were had that issue was joined, and the cause came down to be tried, &c. to prove which the record of *nisi prius* and the *poslea* were admitted as good evidence, and said that such proof was always allowed of in such indictments.

WILLES, *Chief Justice*. It is admitted by the agreement that there was a suit commenced and then depending; the only thing to be proved was the subsequent proceedings in this court, that the cause came down to be tried at the assizes, and that a juror was withdrawn. To be sure in many cases the *poslea* is not evidence of a verdict and judgment; for wherever it is necessary to give a verdict or judgment in evidence, as on ejectment, &c. there it must be entered on record, and a copy of that record must be produced, examined from the records of this court; for after the return of the *poslea*, the verdict or judgment might have been set aside. Here the single fact to be proved is, that the cause came down to be tried and that the juror was withdrawn; and I think the *poslea* and *nisi prius* roll sufficient evidence to prove this, as in an indictment for perjury. So if a wager was depending whether a cause was tried and a verdict given in it, to prove these facts the *poslea* might be good evidence.

PARKER, *Justice*, of the same opinion.

Held good evidence by the whole Court.

Goodridge against Goodridge.

Case 347.

WILLES, *Chief Justice*, delivered the opinion of **THE COURT**.—This comes before the Court on a case made at the assizes, which was thus: *John Goodridge* being seised in fee of the premises in question, and having two sons *Richard* and *John*, devised them in this manner: he first devised the lands in question to his wife for life, and then says, "And my will is, that if my son *Richard* shall happen to die without heirs, then my son *John* shall enjoy my lands." The testator's wife died; and *Richard* entered and died without issue, and without suffering a recovery, but in his life-time devised the premises to his wife. *John*, the second son, brought an ejectment, and is lessor of the plaintiff.

On a devise to *A.* for life, "and if my son *Ri.* shall happen to die without heirs, then my son *John* shall enjoy my lands," the word *heirs* means heirs of the body.

The question on this case is, Whether *Richard*, the eldest son, was tenant in tail or in fee? If he was only tenant in tail, then his brother *John* has a right to the premises, *Richard* not having suffered a recovery; if he was tenant in fee, then it will be for the defendant, who is his devisee.

There are TWO POINTS to be considered:

FIRST, What construction the word "heirs" has in this will, whether it means "heirs in fee," or "heirs of the body?" If the word "heirs" passes an estate in fee to *Richard*, then the remainder over to *John* is void, for after a fee no estate can be further limited. If it means "heirs of his body," then a farther question is made.

SECONDLY, Whether it can pass an estate-tail to *Richard* in the present case, there being no precedent estate given to him to support it?

AS TO THE FIRST QUESTION, we are all of opinion that the word "heirs" must mean "heirs of his body;" for as long as *John* is living, *Richard* cannot possibly die without heirs, therefore it would be absurd to put any other construction on the word. And this distinction has always been allowed, except in *Cro. Car.* 57. but many cases have been determined since on this foundation, and always contrary to this case; as in *Cro. Jac.* 415. devise "to his son, and if my three daughters outlive their brother and his heirs, remainder over;" held that "heirs" here must mean heirs of his body. *Cro. Jac.* 695. devise of "Black Acre to *A.* and his heirs for ever, and of White Acre to *B.* and his heirs for ever, and that the survivor of them should be heir to the other, if either of them die without issue;" held that though the first words passed a fee, yet the subsequent words controuled them, and passed an estate in tail. 3. *Lev.* 70. devise "to *A.* for his life and to his heirs, and for want of heirs of him to *B.* and his heirs;" held that *A.* had an estate-tail, for "heirs" means heirs of his body. 3. *Mod.* 123. devise "to

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"his eldest son, and if he die without heirs male to his second son;" held it passed an estate-tail to the eldest, though the word "body" was wanting. *Salk.* 223. *H.* had three sons, *A. B.* and *C.* and devised his lands to *B.* his second son, after the death of his wife, to hold to him and his heirs for ever, and for want of such heirs then to his own right heirs; held that *B.* the second son, had only an estate-tail; and the word "heirs" can import nothing more than issue, for *B.* could not die without heirs, living heirs of the father; but if the devise over had been to a stranger, *B.* would have had a fee. Thus the distinction has been long settled, that if the second devisee may be heir to the first, the word "heirs," where there is afterwards a limitation over, must mean heirs of the body, and not heirs in fee; for whilst the second devisee is living, the first cannot want heirs general. But where the second devisee is a mere stranger to the first, and cannot be heir to him, there these same words pass a fee to the first devisee. This was so held in the latter end of the reign of *Queen Anne* (a), and grounded on *Dyer*, 33. devise of lands to his daughter for life, remainder to *A. L.* and his heirs, and for default of such heirs remainder over to a stranger; held that these words passed an estate in fee to *A. L.*; but if the remainder had been given to any one that might have been heir to him, it would have been an estate-tail, for then he could not have died without an heir, and so a remainder might properly be.

A devise "to *A.* for life, and if my son *Richard* die without heirs, then my son *John* shall enjoy my land," passes an estate in tail to *Richard* by implication.

SECONDLY, Taking it then that the words here mean "heirs of the body," it is insisted, as a distinction to this case, that in all the cases cited an express estate was before given to the first devisee, so that the word "heirs" had in those cases a relation to the precedent words; but in this case, as no estate is before given to *Richard*, he takes a fee by descent, and then this implication cannot take it from him. But I think this distinction has no foundation in reason or in law: in reason it has none; for why should it be thought the testator intended to give his son a greater estate by the word "heirs," where nothing is before given to him, which is the present case, than where he before devises an express estate to him? so neither has it any foundation in law. To prove the distinction the defendant cited 8. *Co.* 155. *b.* that if a feoffment be made to one and his heirs, there can be no averment of the intent of the party that the feoffee shall have but an estate to him and the heirs of his body; but that is nothing to the present case. *Clash's Case*, *Dyer*, 330. *b.* *Vaugh.* 267. but this case is no more than that the words, "if his two daughters died without issue of their bodies," did not create by implication cross remainders in tail to the devisor's daughters, whereby the eldest should take the part of the youngest, but that her part should go to the heirs at law. An heir at law is not to be disinherited by a possible or probable implication (b); but this is more, for it is a necessary

(a) 11. Mod. 207.

(b) *Vaughan*, 259.

implication.

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against
GOODRIDGE.

implication. In *Moor*, 644. here was an exprefs devise to the eldest son and his heirs, and then there is a devise to the three youngest children in case the eldest son did not pay them twenty pounds each; and held that it was a good devise to the youngest on failure of payment by the eldest, though a fee was vested. *Cro. Eliz.* 525. *Moor*, 422. This is not applicable to the present case, for it depends on the construction of the word "or." As to *Scrape v. Rodes*, that was on so obscure a will, that none was ever penned like it before nor, in all probability, ever will again, and can be no authority in any case. Thus much as to the cases cited by the defendant's Counsel; and though the plaintiffs have cited no case exactly in point with the present case, yet several have been cited to prove that the heir's estate may be turned to an estate-tail by implication. In *Owen*, 29. the testator having three sons devised lands in these words: "That if it shall please God to take to his mercy my son *Richard* before he shall have issue of his body, so that my lands shall descend to my son *George*, then, &c." and the question was, Whether *Richard*, who was yet living, had an estate in tail by these words? and all the Justices agreed, that it was a plain implication to make an estate-tail in *Richard*, 13. *Hen. 7.* 17. *Vaugh.* 259. is in point for the plaintiff, for here was no precedent devise to the heir: It was held here that the heir was not disinherited by the implication, because it was only a possible or probable one; but it was agreed that if it had been a necessary implication, as it is in this case, it had been otherwise. If a devise be made of a house to the heir at law after the death of his wife, the wife shall have the house for her life by implication, the heir at law being expressly excluded. I do not rely on *Benisford's Case* (a), for that was on a feoffment to uses, and a very nice determination, and could not have been so determined by turning the word "of" into "de" in Latin. The rule for construction in the case of a will in order to disinherit an heir at law by implication, is, that the words must have a clear and apparent intent, and must not be ambiguous or any way doubtful. LORD VAUGHAN's rule, in the case of *Gardner v. Sheldon*, is rather carried too far, and is, in general, too strong; yet, strong as it is, this case is within the construction of it: he says that an heir is not to be disinherited by a constructive or possible, but only by a necessary implication; and that a necessary implication is where the words can admit of no other construction; and I think the words in this will are within that description; and that the construction here made of the word "heirs" to mean "heirs of the body," arises from a necessary implication, since *Richard* cannot possibly die without heirs general as long as *John* is living. The words, therefore, must have the same construction as if he had said, "If my son *Richard* die without heirs of his body, then my son *John* shall enjoy my lands," and will admit of no other.

The lessor of the plaintiff must have the *possession*.

Case 348.

Dabble, on the Demise of Jones, *against* Elstol.

Whether a deed was in fact executed, is proper for a jury to determine.

IN AN EJECTMENT for several lands in *Hampshire*, the plaintiff proved his title as heir at law to *Mrs. Moore*, who was last seized. The defendant claimed part of the premises under a deed-poll from the said *Mrs. Moore*, by which in her life-time she gave some particular estates, there mentioned, to one *Mr. Samuel Willis*, under whom the defendant claimed. The defendant proved the execution of the deed-poll by *Mrs. Moore*, but said he believed it was not read over to her. Another witness proved, that *Mrs. Moore* said that *Mr. Willis* was her particular friend, and she wished that she had more to give him. No consideration appeared to have been given by *Willis*, nor was he any relation to *Mrs. Moore*; but the plaintiff was her own daughter.

Upon this evidence THE JUDGE left it to the jury to determine whether they believed the evidence in favour of the defendant; and left them to consider whether they believed the deed was well executed by *Mrs. Moore*, and whether it was according to her intention. The jury brought in a general verdict for the plaintiff.

The defendant now moved to set aside the verdict, as being given contrary to evidence.

GAPPER. It is admitted that the defendant only claims part of the premises by virtue of this deed-poll, and that as to the other part the plaintiff has a clear title; this being so, the verdict cannot be set aside, though the Court should think it contrary to evidence; and he cited a case in *Michaelmas Term*, in the seventh year of *George the Second*, in the common pleas, where two issues were tried, and a verdict for the plaintiff in both, but one of them appeared to be against evidence, yet, as one of the issues was admitted to be right, the Court would not grant a new trial, for they must set aside both or none.

THE COURT all held that this rule had no foundation in law; for if the Court be of opinion that a verdict is against evidence, they will set it aside, though for part of it the verdict was right.

PARKER, *Justice*, made a difference, that where the action is brought against several defendants, and for some of them a verdict is given rightly, but for others wrongfully, such verdict cannot be set aside.

THEY ALL HELD, as to the principal question, that it was matter very proper to be left to the jury on the credibility of the evidence and the circumstances attending it; and as they have given a verdict for the plaintiff, the Court ought not to set it aside as against evidence, for the jury are the proper judges.

The defendant's motion was denied.

Duckworth

Duckworth, on the Demise of Tubly, *against* Tunstall. Case 349.

THE PLAINTIFF being both executor and devisee of *A.* served the defendant with an ejectment, on the 4. Geo. 2. c. 28. for non-payment of rent, thirty-nine pounds of which was due to the plaintiff himself as devisee in his own time, and the rest was due in the testator's life-time, which the plaintiff also claimed as executor.

A person, who is both executor and devisee, cannot join debts due to him in those characters respectively, in the same declaration.

The defendant moved to pay thirty-nine pounds into court, and to stay proceedings, &c. on the fourth section of the said act, which he insisted was all the plaintiff, by his own showing, had a right to recover on the ejectment, and that for the rest he ought to bring an action.

S. C. 2. Barnes, 150.

The plaintiff refused to accept it unless the whole rent due was paid, as well what accrued in the testator's life-time as what became due since his death, as he was executor as well as devisee.

THE COURT all held, that the plaintiff was intitled to recover no more rent on this ejectment than was due to him as devisee since the testator's death, and that for the residue, which was due in the testator's life time, he must bring an action as executor. They compared it to a mortgagor who brings a bill to redeem on payment of the mortgage-money, &c. the Court will not oblige him to pay other debts which he may have contracted with the mortgagee on bond, &c. unless such debts are particularly charged on the premises, but for these the mortgagee must bring his action. But if the person who comes to redeem be heir at law to the mortgagor, so that the securities would be a *lien* on the estate, he shall in that case be obliged to pay them before he is permitted to redeem. 2. Chan. Rep. 316.

The proceedings were stayed.

Goodwright, on the Demise of Griffin, *against* Fawson. Case 350.

EJECTMENT brought for one messuage "situate, lying, and being in *Coventry*, in the parishes of *Saint John the Baptist* and *Saint Michael*, or one of them."

The uncertainty of a declaration in ejectment for lands lying in the parishes of *A.* and *B.*

The plaintiff had a verdict.

The defendant moves in arrest of judgment, for that the ejectment is quite uncertain, for the words "or one of them" does not relate to either of the parishes in particular; and the defendant can neither know what to plead, nor the sheriff how to give possession.

"or one of them" is not cured by the verdict.

S. C. 2. Barnes, 150.

The plaintiff insisted, that since the statute for amendment of the law, as the *venue* is to come from the body of the county, it would have been sufficient to have laid it in *Coventry* generally.

The

GOODWRIGHT
against
FAWSON.

The cases cited were *Cro. Jac.* 124. 307. 2. *Roll. Abr. tit. "Trial"* 622, 623. *f.* 37. 59. 6. *Co. 74. Carth.* 204.

ALL THE COURT held, that it was laid too uncertain, and that the words "or one of them" could not be rejected.

The judgment was arrested.

Case 351.

Ratcliffe against Goodcheap.

On what affidavit a defendant may be held to bail in an action on a bottomree-bond.

- 2. Bull. 54.
- 6. Mod. 38.
- 1. Lev. 260.
- 2. Stra. 1190.
- 2. Burr. 747.
- 1. Show. 14.
- 1. Stra. 476.
- 4. Bac. Abr. 673.

ACTION OF DEBT on a bottomree-bond. The plaintiff made an affidavit that the defendant was indebted to him in so much money as appears by the bond, and says further that the ship on which the bond was given was not lost by unavoidable accident, but for want of care, as he, the said plaintiff, has been informed and verily believes.

The defendant made an affidavit that all proper care was taken of the ship, and that it was lost by storms and unavoidably, or to that effect.

On the part of the plaintiff an affidavit was made by one *John Deane*, who was a sailor on board, wherein he swore positively that the ship was lost for want of proper care, and if the captain and mariners had not deserted her, she might have gone on safely on her voyage.

The question was, Whether on these affidavits the defendant ought to be held to bail?

WILLES, Chief Justice. There must be a probable cause shewn to hold a defendant to bail. The general rule is, that there must be a positive affidavit, and where that can be had, the Court requires it. But to this rule there are exceptions, for if from the nature of the demand a positive affidavit cannot be had, the Court will dispense with it, and admit the best and most certain which can be got. As an executor cannot make a positive affidavit of the debt because it was contracted with another person, and therefore it is not required; so on bottomree-bonds positive affidavits are not expected, and therefore the plaintiff swears only to his information and belief. In the case of *Manning v. Williams (a)*, lately in this court, the reason why the Court refused to let the defendant be held to special bail, was not on account of the plaintiff's affidavit being deficient, but because the defendant swore positively that the ship was unavoidably lost, and therefore, as the plaintiff had in that case no positive affidavit to counterbalance the defendant's, there being nothing but the plaintiff's own affidavit in the usual form, to his information and belief, we did not hold the defendant to bail. But here is the positive affidavit of *John Deane* for the plaintiff, which answers the defendant's positive one; and wherever there is one positive affidavit for the plaintiff, though there are several as positive for the defendant, yet he shall be held to special bail.

BURNETT, Justice, was of the same opinion.

The rule for a common appearance was discharged.

(a) 2. Barnes, 58.

TRINITY TERM,

The Sixteenth of George the Second,

IN

The King's Bench.

Sir William Lee, *Knt*, *Chief Justice*.

Sir William Chapple, *Knt*.

Martin Wright, *Esq*.

Thomas Dennison, *Esq*.

} *Justices*.

Sir Dudley Ryder, *Knt*. *Attorney General*.

The Hon. William Murray, *Solicitor General*.

Bosworth against Budgen.

Case 352.

ON a special return to a *habeas corpus* it appeared, that there is a custom in the city of London, and a by-law made in pursuance of it, "that no freeman of the city of London shall set to work any person, being a foreigner to the freedom of the city, in any manual occupation whatsoever, within the city of London or the liberties thereof, under the penalty of five pounds."

The custom of London not to employ a foreigner in any manual occupation within the city, is good.

S. C. 2. Stra.

1112.

An action was brought against the defendant, being a freeman of London, for employing a foreigner not free of the city to work for him as a *currier*, well knowing the by-law and having notice of it.

The defendant took several exceptions to the by-law and custom to shew that they were unreasonable and void.

LEE, *Chief Justice*, delivered the opinion of the Court. Several exceptions have been taken:

FIRST, For that it excludes all persons who are not actually free, and that there ought to be a saving for such as are entitled to their freedom, though they have not taken it up.

SECONDLY,

BOSWORTH
against
BUDGEN.

SECONDLY, That the by-law and custom forbid the setting to work in any manual occupation generally; and it ought to be in any manual occupation for hire, gain, or sale.

THIRDLY, That the custom is laid to be within the city only, but the by-law is within the city and liberty of the city.

FOURTHLY, This restrains a freeman from employing any but freemen, whereas it may happen that a sufficient number of freemen cannot be had, or the freemen may refuse to work, which will then be a restraint on trade for want of hands to carry it on.

AS TO THE FIRST EXCEPTION, the resolution of the Court in *Waggoner's Case* (a) is a full answer to it; for there the custom as set forth in the pleading, for it did not appear on the return, was, that no person not being free should keep an open shop, &c. and there was no saving of persons entitled to their freedom, which is a resolution in point as to this objection; for it was as strong an objection in that case, though indeed the custom was not applicable to this.

AS TO THE SECOND OBJECTION, the reason made use of in *Waggoner's Case* is an answer to that also, for it is against using a trade, occupation, or handicraft for hire, gain, or sale. It was objected, though it was averred that *Waggoner* used the occupation of a tallow-chandler, yet it was not averred that he sold any candles, and so he might make them for his own use; but it was held that by using a manual occupation, it must be understood that he followed a trade; for it could not be said to be using a manual occupation when he worked only for his own use, but must imply a sale for profit.

AS TO THE THIRD EXCEPTION, upon this return we must take "the city" and "liberty of the city" to be the same, unless the contrary appears. *Cart. 122.*

AS TO THE FOURTH EXCEPTION, if this was to take place, it would destroy several by-laws which have been adjudged good; as that to restrain the number of carts, 4. *Mod. 228.* that none should unload coals from carts but particular persons, 3. *Mod. 193.* and the case of *Fazakerly v. Wiltshire*, Trinity Term, in the seventh year of *George the First*. In these cases the same objection was taken as has been done here, but yet the by-laws were held good; and the truth and reason of those cases was, that the by-laws have the appearance of restraining trade, yet when they are founded on a custom which is the law of the place, they have been considered as regulations proper for the place where the trade is used. If, therefore, a custom restraining one from using a trade but under certain regulations be good, which is *Waggoner's Case*, it seems *a fortiori* that a by-law founded on a custom restraining a man

from employing others but under regulations, should be good also. In *Hard*. 56. it is recited, that this by-law was held good; and the Book says, though intended to abridge trade and the liberty of the subject, yet being for the good and better government of trade in general, it was allowable.

ANOTHER OBJECTION was to the action being brought in the name of the chamberlain, for it was said the city would by that means be both judge and party. But it was held that the chamberlain was the proper person to bring the action. 5. Co. 63. 1. Roll. Abr. 366. Moor, 403.

THE COURT held that the custom and by-law was good (a), and a *procedendo* was granted.

(a) See *Fazakerly v. Wiltshire*, (D. 2.). 2. Com. Dig. "By-Law" 5. Com. Dig. 14. *Robinson v. Well*, (C. 2.) (C. 3.). 1. Stra. 462. and 6. Com. Dig. "Trade".

BOSWORTH
against
BUDGEN.

Read, Assignee of Lingood, against Vaughan.

Cafe 353.

THIS was an action of *assumpsit* for money had and received to and for the use of *Read* the assignee.

An assignee may affirm or disaffirm the contract of the bankrupt.

BOOTLE moved in arrest of judgment, that if the receipt of the money was wrongful, the action ought not to have been an action of *assumpsit* on the contract, but an action of *trover* on the *tort*.

LEE, Chief Justice. An assignee may either affirm the act of the bankrupt, or may disaffirm it, and make it a *tort* or nullity.

CHAPPLE, Justice. If the assignee employed the defendant to get in the money of the bankrupt, this is money had and received to the plaintiff's use.

Judgment was given for the plaintiff.

Cary against Jefferson.

Cafe 354.

THIS was a motion to amend the first *scire facias* against bail, after a plea of *nul tiel record* to the second.

A *scire facias* against bail cannot be amended.

LEE, Chief Justice. In the case of *Hilliard v. Frost*, in the seventh year of *George the First*, the Court refused to amend a *scire facias* against bail.

THE COURT. Let the rule to shew cause be discharged, for the writ cannot be amended. The party may discharge the writ and bring another, and then the principal may be surrendered.

Case 355.

In what case the Court will make a plaintiff, being a foreigner, give security for costs.

1. Stra. 694.

497.

B. N. P. 111.

2. Stra. 532.

1206.

1. Will. 130.

Plumbe against Marlon.

FORD moved to stay proceedings against the defendant until the plaintiff should give his security to pay costs.

The action was for goods sold and delivered. The ground of the motion was, that the plaintiff was a foreigner resident at *Stockholm*, the metropolis of *Sweden*.

BUT THE COURT refused to grant the motion, alledging that it was never done except in an action of *ejusdem*, where the lessor of the plaintiff is an infant (a).

1. Term Rep. 491.

(a) But the Court will now also stay the proceedings, where the plaintiff is a foreigner, residing abroad, or resides either in *Scotland* or in *Ireland*, until he give security for the costs. *Birchman v. Wright*, Bull. N. P. 311. *Lucas v. Falwood*, 2. Burr. 1177. *Pray v. Edie*,

1. Term Rep. 267. *Fitzgerald v. Whitmore*, 1. Term Rep. 362. But there is a difference in the practice of the courts of king's bench and common pleas upon this subject. *De La Preuve v. Biron*, 4. Term Rep. 697. *Parquet v. Eling*, 1. H. El. Rep. 106.

Case 356.

An affidavit to stay proceedings or to give security for costs.

1. Will. 130.

Case 357.

A bill taken against a defendant.

1. Will. 130.

TRINITY TERM,

The Seventeenth and Eighteenth of George the
Second,

The Common Pleas.

Sir John Willes, *Knt. Chief Justice.*

Sir William Fortescue, *Knt.*

Sir Thomas Burnett, *Knt.*

Sir Thomas Abney, *Knt.*

} *Justices.*

Sir Dudley Ryder, *Knt. Attorney General.*

The Hon. William Murray, *Solicitor General.*

Pilgrim against Kinder.

Cafe 356.

THIS was an action upon the case, wherein the plaintiff declared, in *Michaelmas Term* last, upon five several promises, and laid each count (a) for ten pounds; and his cause of action on each on the first day of *September* last; and concluded his declaration to his damage of twenty pounds, by reason of the defendant's breach of the said promises. The plaintiff, before suing out his original, had given a promissory note to the defendant for eight pounds, payable within one month after *Michaelmas*.

The defendant imparled till after the note became payable, and then pleaded a set off in bar, "That the plaintiff ought not to have his action against the defendant, because the plaintiff, on the twenty-fourth of *August*, before the day of his obtaining his original writ, made his note, and thereby promised to pay to

(a) The five counts in the declaration were these: The first, an *indebitatus assumpsit* for goods sold and delivered to the defendant on the first of *September* last. The second, a *quantum valchant* for other goods sold on the said first of *September*. The third, an *indebitatus*

assumpsit for work and labour on the said first of *September*. The fourth, a *quantum meruit* for other work and labour on the said first of *September*. And the fifth, an *indebitatus assumpsit* for money laid out and expended on the said day. *MS.*

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" the

PILGRIM
against
KINDER.

"the defendant the sum of eight pounds one month after *Michaelmas* then next ensuing, which note remains unsatisfied, and the money thereupon, which is now due and payable to the defendant, exceeds the money due from him to the plaintiff on the promises in the declaration; and this he is ready to verify; therefore prays judgment whether the plaintiff ought to have his action against him."

The plaintiff replied, That he sued out his original on the twenty-second of *June* last (which is before the time laid of his cause of action in his declaration), and traverses his giving the note before that time; *et hoc paratus est verificare*; and therefore prays judgment and his damages.

The defendant rejoined, that no such writ was ever sued forth as in the replication is mentioned; *et hoc paratus est verificare*; wherefore he prays judgment, if the plaintiff ought to have his action against him.

To this the plaintiff demurred generally, and the defendant joined in demurrer.

SERJEANT BELFIELD *for the plaintiff*. Both the plea and the rejoinder are ill. The plea is liable to these objections: FIRST, the matter in the plea is not pleadable upon the statutes of Set-off. SECONDLY, admitting such matter to be pleadable within the statutes of Set-off, yet it is not in the present case pleadable in bar by *actio non*, but ought to have been pleaded *puis darrein continuance*; the note pleaded not becoming due until after a continuance, by the defendant's imparling. THIRDLY, suppose this matter may be pleaded by *actio non*, yet it is badly pleaded; for it does not fully and completely deny any of the counts in the declaration, and tenders a matter too complex to take issue upon.

THE FIRST OBJECTION. This promissory note is not pleadable by virtue of any of the statutes of Set-off, because the note was not payable until long after the action brought. No action can be brought on such note till the day of payment. A note does not come under the rule of *debitum in presenti solvendum in futuro*; for a note payable at a future day is no debt till the day of payment, though the law is otherwise of a bond. This distinction was settled in the case of *Sparke v. Tully (a)*. The statutes of Set-off were to prevent circuity of action, by permitting one debt to be set against another, which could not be so at law. A plea of set-off by a defendant under those statutes is in the nature of a declaration against the plaintiff, and it must be of such a debt for which he could declare, if he brought a distinct action; but it is plain he could not have declared upon this note, because the day of its payment was not arrived. The defendant ought to have paid this demand to the plaintiff, that he might have his

(a) 2. Eq. Abr. 105. 2. Stra. 867. 2. Ld. Ray. 1546. 1. Bar. K.B. 59. 67. 79.

PILGRIM
against
KINDRED

advantage of it in the mean time, otherwise his defence falls upon this absurdity, "I owe you money for which you have sued me, and "I won't pay you, because hereafter you will become indebted to "me."

THE SECOND OBJECTION to the plea is, That admitting such note as the present to be pleaded by way of set-off, yet it is not pleadable in bar by *actio non*, but ought to have been pleaded *puis darrein continuance*, because the note did not become a debt or payable until after the defendant had continued the cause by imparling. The plea of *actio non*, or in bar, and the plea of the very same matter *puis darrein continuance*, have different consequences with regard to the plaintiff. For where, after a continuance of the cause, any matter arises subsequent in time to the declaration, and before the plea the defendant may plead such matter specially, as that since the last continuance such a fact happened as the note became payable, &c. and then the plaintiff may confess it, and judgment thereupon will be, that the defendant *eat inde sine die*, and the plaintiff shall pay no costs, nor be amerced, because he had a ground or good cause of action at the time of bringing his writ and declaring, and the defendant's plea is only an excuse; whereas, if the matter is not pleaded *puis darrein continuance*, and judgment goes for the defendant, the plaintiff shall be amerced for his unjust suit, and shall also pay costs.

THE THIRD OBJECTION to the plea is, That supposing this note needs not to be pleaded *puis darrein continuance*, but may be pleaded by *actionem non*, or in bar, yet it is even then badly pleaded. FIRST, as it does not answer any count in the declaration fully and compleatly, as it ought to be done; and, SECONDLY, as it tenders matter too complicated to form an issue upon. In the first place, it is no compleat answer, for it does not fully and properly deny any one of the five counts. The first count is an *indebitatus assumpsit* for goods sold and delivered for ten pounds, which is absurd and improper: for the plaintiff's charge of ten pounds in this count must be presumed to be the real sum due, till denied by the defendant's plea, or found to be otherwise by a jury. The defendant ought not to have pleaded so absurdly, but should have answered the whole demand of ten pounds laid in the *indebitatus assumpsit*, by pleading *non assumpsit* as to two pounds, and the note (if pleadable at all) to the remaining eight pounds. And as to the count upon the *quantum meruit*, if the defendant would have pleaded a tender of eight pounds to a demand of ten pounds, he must have averred that the goods were worth no more than the money tendered. In the last place, the plea is not issuable; first, as it is an absurdity to try whether eight pounds exceeds ten pounds; or secondly, if it may be reduced to a certain point by verdict: yet to do that, the jury must state an account in a long intricate affair; they must first state the plaintiff's account, and then the defendant's, and then see what the balance is: this

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would

*Plaintiff
against
Defendant.*

would be carrying the thing farther than even the action of account, the proper business of which is to adjust accounts; for even there neither the Judge or the jury take the account, but the Court gives judgment against the defendant *quod computet*, and auditors are assigned to take the account, and the Court never does it itself.

BESIDES, the rejoinder is bad; the plaintiff has replied an original of the twenty-second of *June*, which presupposes it to be returned and filed, and made a record in order to give the Court a jurisdiction. The defendant has rejoined to this, no such original, and concludes with an *et hoc paratus est verificare*; which averment is wrong, for the original is a record, and not triable by the country. The defendant in his rejoinder should have taken issue upon it, and concluded to the country, *et hoc petit quod inquiretur per patriam*. There was a plain affirmative and negative upon which issue ought to have been joined, but instead of doing that, the defendant concludes with an averment *et hoc paratus est verificare*, that there was no such original.

SERJEANT DRAPER and SERJEANT EYRE for the defendant. The plaintiff has abated his suit by his own showing; for he has laid all the premises in all the five counts to be on the first day of *September*, which is conclusive upon him that no cause of action arose before that time, and yet in his replication he sets forth an original sued out on the twenty-second of *June*, which being before the cause of action, abates the suit. And they cited the case of *Lauden Jones*, an attorney of this court, *v. Burnett*, in LORD KING's time, in the court of common pleas. The plaintiff brought his attachment of privilege tested on the twelfth day of *February*, and declared as indorsee of a promissory note; to which the defendant pleaded, that the note was not indorsed till after the twelfth of *February*, and that the original was issued before any cause of action; the plaintiff replied, that *verè et in factò* the writ was not sued out till the twelfth of *March*, although it was tested the twelfth of *February* before, and that the note was indorsed before the actual suing out of the writ, although it was not indorsed before the *teste*; to this there was a demurrer; and the Court held that the plaintiff had abated his suit of his own showing.

SECONDLY, A plea *puis darrein continuance* cannot be pleaded in the first instance, but must be always pleaded after some former plea; and they cited the case of *Green v. Moor* (a), where a declaration was in *Trinity Term*, and the defendant pleaded the outlawry in bar, but did not say that the outlawry was *puis darrein continuance*, whereupon the plaintiff demurred; and the plea was held to be good enough, though it was not pleaded *puis darrein continuance*.

(a) 5. Mod. 117

WILLES,

Pleas
against
Kinzel.

WILLES, *Chief Justice*. This comes before the Court upon a demurrer after a declaration, a plea, a replication, and a rejoinder, and the demurrer is to the rejoinder; but notwithstanding that, if the declaration be bad, the plaintiff cannot recover: if the plea is ill, judgment must go against the defendant: if the replication is wrong, the plaintiff must fail: but if the replication is good, and the rejoinder bad, then the plaintiff will succeed. It will be material, therefore, to consider every one of these. At the first argument there were objections to every thing but the replication, and that was not quite spared; for it was said, that by that the plaintiff had discontinued his own suit. The declaration is upon several promises, and consists of five counts, every one of which is for ten pounds, and the total of the damages at the end of the declaration is laid at twenty pounds. The plea traverses none of the counts, and therefore in fact admits the justness of the demand, the whole of which is laid to twenty pounds; but the defendant pleads a set-off, "That the plaintiff, before the obtaining his original writ, did by note promise to pay to the defendant eight pounds one month after *Michaelmas*, which eight pounds exceed the money due to the plaintiff." The plaintiff replies, the time of taking out the original writ, and traverses the making of the note before that time, and this he is ready to verify. The defendant rejoins, that there was no such original writ, *et hoc paratus est verificare*.

The declaration and replication are both good: but the plea is bad, both in substance and in form. I shall admit, that a note may be released before it is payable; and by some late acts of parliament a creditor, whose note is not immediately payable, may come in for a distribution out of the effects of his debtor, if he is a bankrupt, and may also be a petitioning creditor for a commission of bankrupt. But those are not parallel cases to the present; for the question here is, Whether, at the time of his action brought by the plaintiff, there was a debt due to the defendant, upon which he could bring his action? for this statute of Set-off was made to prevent multiplicity of actions; and if the defendant had a demand at the same time as the plaintiff had, he might have set it off against the plaintiff's demand, and then all would be determined by one action; but then both ought to have a right of action at such time. But as this declaration was of *Michaelmas Term*, and by relation of the twenty-third of *October*, the defendant could not then bring an action upon such note, which was not payable till the twenty-ninth of *September* following. And though the note was payable within a few days after the commencement of the action, yet if we determine that if a note payable within a day after an action brought may be set off against the demand of such action, we know not where to stop. The law prescribes no limits, and we should in effect determine that a note may be set-off against a present demand, although such note is not payable in one, two, or three years; and this determination would throw us upon this absurdity, That a defendant might say to a plea, "I now owe you ten pounds, for

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"which you have brought an action, but you shall not recover in
"one, because in two years time you will be indebted to me in the
"same sum;" which defence, at the very mention of it, abounds
with injustice. It is further said, that though this note was not
payable at the time of the declaration, yet that it was due before
the plea of set-off. This deserves some more consideration, and
we must reflect whether the action was rightly brought or not;
and to be sure it was: wherefore it will be barred or abated accord-
ing as the act which he committed sounded either in abatement
or in bar. But even in those cases, if the release was given or
the money accepted after a continuance by imparling, such matter
could not be pleaded by *actionem non*, but ought to be pleaded
puis darrein continuance, and for this reason, because the judg-
ments differ; for upon a plea of *actio non*, the plaintiff must pay
costs, and be amerced if judgment is against him; but if the same
matter be pleaded *puis darrein continuance*, and judgment against
the plaintiff, he shall neither be amerced, nor pay costs. And
would it be reasonable that the plaintiff should pay costs, &c.
when at the time of commencing his suit, he had good cause of
action, because after that the defendant got an answer to the decla-
ration? We need not go into the rejoinder; but that it might not
be taken that the rejoinder is right, we have looked into that, and it
is manifestly wrong. The plaintiff in his replication alleges the
suing out of an original writ, *et hoc paratus est verificare*, and we
determined in a late case that this conclusion is right; and that he
could not conclude with a *petit quod inquiratur per patriam*, be-
cause he does not give the other party an opportunity of answering it;
but when he has replied "an original," and made the proper aver-
ment, the defendant, upon the denying the issuing of such original,
should have taken issue, and not have concluded with the same
averment as the plaintiff had done, for if that was allowable, a cause
would never come to issue; and where a man alleges a fact, and
another denies it, he should join issue, instead of concluding with
an averment.

FORTESCUE and AENBY, *Justices*, were of the same opinion.
BURNETT, *Justice*. In order to plead a set-off by *actio non*, the
demand of the defendant must be due at the time of issuing the
original; for if the demand become due afterwards, it must be
pleaded *puis darrein continuance*, notwithstanding the case of
Green v. Moore (a), where the Court seemed of opinion that out-
lawry in the plaintiff between the declaration and the plea
need not be pleaded *puis darrein continuance*; but I doubt
whether that case be law. The case of *Ewer v. Moyle* is
plainly contrary; it was the case of a defence which ac-
crued after action brought, and before plea pleaded in chief; and
there one of the reasons why the plea was held bad was, because it
accrued after the action brought, and should not have been pleaded

(a) 1. Salk. 178. 5. Mod. 11. See also 5. Term Rep. 224.

in bar, but *puis darrein continuance*. In the case of *Green v. Moore*, the Court might, perhaps, distinguish an outlawry, which is a matter of record, from a matter *in pais*, which was the case of *Ewer v. Moyle*, but I can see no reason for that distinction. Upon the whole, I am of the same opinion as my brothers.

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KINDER.

Judgment was given for the plaintiff.

Atkinson *against* Seetree.

Case 357.

SIR THOMAS ABNEY, *Justice*, gave this account of the difference between the ancient COURT OF MARSHALSEA, and that which is now vulgarly called by the same name, but more properly THE PALACE COURT.

Difference be-
tween THE
MARSHALSEA
and THE PA-
LACE COURT.

KING JAMES THE FIRST erected the latter; its jurisdiction extends twelve miles round the palace of WHITEHALL; and the Judge may hold the court where he pleases, except in the four great courts at *Westminster*, or in the duchy court. The ancient Marshalsea court, which is the subject of the case in *Sir Edward Coke's Reports*, is still subsisting, and is a travelling or moveable court, and its jurisdiction reaches twelve miles round about the court where the King shall be then resident. The parties or suitors in the old Marshalsea court must be of the household, but those of THE PALACE COURT must not be of the household; for if they are of that, they must have recourse to THE MARSHALSEA COURT. The suits are more troublesome in the latter, because the court is constantly removing: the steward of the Marshalsea is nominated by the lord steward or master of the household; but the Judge of the palace court, or that which is now commonly called "The Marshalsea," is appointed by the King's letters patents.

Milbourn *against* Reade.

Case 358.

THIS was an action of trespass, wherein the plaintiff declared, "that the defendant with force and arms did make an assault upon the plaintiff in the parish of *A.* in the county of *Northum-berland*, and did there beat, wound, and evil entreat the plaintiff, so that his life was despaired of, and did then and there also obstruct the plaintiff from getting of coals, and the coals of the plaintiff there found, took, and carried away of the goods and chattels to the value of ten pounds, trod upon and spoiled, and one standard of the plaintiff there lately erected, and one roller fixed thereupon of the value of one hundred shillings, did take, break, and pull down, and other goods and chattels to the value of ten pounds did take and carry away." There was a SECOND COUNT very little variant from the first. The defendant pleaded *not guilty*.

If any other
trespass, not
within the sta-
tute 22. Car. 2.
c. 9. as a *seu-*
lition of personal
chattels, be sta-
ted in the de-
claration in an
action of assault
and battery, as
a substantive
and indepen-
dent injury, and
for which a dis-
tinct satisfaction
might be ob-
tained in a sepa-
rate action, the
plaintiff, on a
general verdict
in his favour
shall have full
costs, though
cited.

obtained in a separate action, the plaintiff, on a general verdict in his favour shall have full costs, though cited. —S.C. 2. Barnes' Notes, 108. S.C. 3. Will. 345.

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THE JURY find, that as to all the premises laid to the charge of the defendant, he is thereof *guilty*, except as to the taking away of the goods and chattels in the declaration mentioned; and assents damages for the plaintiff by reason thereof to five shillings, and costs at five shillings; and as to the taking away of the said goods and chattels, they find the defendant *not guilty*.

Upon this verdict, there was no *certificate* of the Judge that the assault, &c. was sufficiently proved, or that the title, &c. was in question.

THE QUESTION was, Whether the plaintiff should be intitled to full costs? his damages being found to be less than forty shillings; and, Whether his case is within the statute of 22. and 23. Car. 2. c. 9. s. 136. If it be, he is clearly not intitled to costs, because the Judge who tried the cause has not certified as that statute requires.

WILLES, *Chief Justice*. The plaintiff in this cause has proceeded to tax his costs with the prothonotary, and the defendant has obtained a rule to shew cause why such taxation should not be set aside; upon this foundation, that the plaintiff is not intitled to full costs, his damages being under forty shillings, and the Judge not having certified upon the statute of 22. and 23. Car. 2. c. 9. s. 136. In order to give my opinion, I shall proceed through the several statutes of costs: I shall not say much of the statute of *Gloucester*, for undoubtedly by that the plaintiff is intitled to full costs, unless restrained by the later statutes. The only question is, Whether or no the statutes subsequent to that of *Gloucester* have prevented the plaintiff from having full costs? The first statute is 43. Eliz. c. 6. s. 2. whose title is, "An act to prevent trifling and frivolous suits in law in her majesty's courts of *Westminster*;" and which statute, for its usefulness, ought to have been put in execution, though it was never done so until the Sittings after last Term, although it is the only foundation that the Courts of *Westminster* can go upon in the construction of the statute of 22. and 23. Car. 2. c. 9. s. 136. The statute of 43. Eliz. c. 6. s. 2. enacts, that "If, upon any personal action to be brought in any of the courts at *Westminster*, not being for any title or interest of lands, or concerning the freehold or inheritance of any lands, nor for any battery itself, it shall appear to the Judges for the same court, and so signified or set down by the Justices before whom it shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of forty shillings or above; that in every such case, the Judges and Justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions." This statute of 43. Eliz. c. 6. has been taken frequently, in common consideration, I don't say in legal or judicial proceedings, to have given the Judges an authority

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authority to certify, in order to intitle the plaintiff to costs. But the case is just the reverse; for the plaintiff would have his costs as before by the statute of *Gloucester*, unless the Judge certifies upon the 43. *Eliz.* to prevent his having costs. But as the Judges never certified upon the 43. *Eliz.* it had no effect at all; for though the suit was frivolous, and the plaintiff recovered less than forty shillings, yet he had still his full costs upon the statute of *Gloucester*, and could be only deprived of them by a certificate of the Judge upon the 43. *Eliz.* c. 6. and it appears from the case of *Reeves v. Butler* (a), that there had never been any such certificate since the making of that statute. If the present was a new case, I doubt whether I should construe the statute of 22. and 23. *Car.* 2. agreeably to the later resolutions; I think I should not; but it would be a dangerous thing *quieta movere*, or to adjudge contrary to a great succession of cases for above these fifty years; but I shall adhere to those cases, especially as the latter part of that statute enacts, that where costs shall be given contrary to that statute, the judgment shall be void. This is a strong reason with me for adhering to the many later resolutions; for if I was to determine that this statute had been misconstrued as to costs, and that the Judges had given greater costs in some actions without a certificate than that act of parliament entitles them to do, I should make all those judgments liable to be reversed by writs of error, in all cases where such writs of error were not barred by the statute of Limitations. It is true, that immediately after the making of the statute of 22. and 23. *Car.* 2. the Judges, upon consultation with the prothonotaries, seem to have been of opinion that that statute extended to other actions besides those of assaults and battery, and actions of trespass *quare clausum fregit*, as appears from the case of the *Earl of Pembroke v. Westale* (b), something above two years after that statute was made; but since the twenty-fifth year of *Charles the Second*, it has been the constant uniform resolution of the Courts at *Westminster*, that the statute of 22. and 23. *Car.* 2. c. 9. was not to be extended to other actions, but to be confined to actions of assaults and battery, and trespass *quare clausum fregit*, as appears from the case of *Smith v. Batterson* (c). The reason given in some Books, to take a case out of the statute 22. and 23. *Car.* 2. c. 9. is frivolous and idle; as that there was a destruction or spoliation of a chattel, or an *assortavit* of a chattel: the talking in this way seems to shew an endeavour in the Judges to find out a reason to take cases out of the statute; and because they could not find a good one, they were willing to adopt any reason. The spoliation and *assortavit* of a mere personal chattel is clearly out of the statute, for neither of them can amount to an evidence that the title of the land was in question; which is requisite to be certified to bring the case within 22. and 23. *Car.* 2. c. 9. In giving my opinion in this case, that the plaintiff is intitled to full costs without a certificate from the Judge, upon 22. and 23. *Car.* 2. c. 9. I do not

(a) Burb. 467. Rep. Eq. 195.

(c) Raym. 487. T. Jones, 232.

(b) 3. Keb. 247.

2. Show. 258.

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at all rely upon an *assortavit* or the spoliation of a chattel, but lay them quite out of the case; but what I rely upon is, that the plaintiff, in no case where his damages are under forty shillings, needs the certificate of a Judge to intitle him to full costs, except either in actions for assault and battery, or trespasss *quare clausum fregit*, which is the foundation of the judgments in the case of *Venn v. Phillips* (a), and that of *Thompson v. Berry* (b), on both which cases I found myself. The Judges in neither of these cases paid any regard to the spoliation, or *assortavit*. In the case of *Venn v. Phillips*, the Court could not go upon the *assortavit* of the hog, for of that the defendant was found not guilty; nor could they go upon the spoliation or destruction of the sheep, as appears from the reason they give in the case, which is, that that statute extends only to such cases where the Judges can certify, and they can only certify in assault and battery, and trespasss *quare clausum fregit*; for the statute of 22. and 23. Car. 2. c. 9. as to all other cases but those two, leaves them upon the 43. Eliz. c. 6. thinking that effectual enough as to them. Since the making of the statute 22. and 23. Car. 2. c. 9. the plaintiff cannot have costs in assault and battery and *clausum fregit*, unless the Judge certifies pursuant to the act; but as to all other personal actions, wherein there can be no certificate upon the 22. and 23. Car. 2. c. 9. as debt, *assumpsit*, trover, trespass for spoiling his goods, or taking his goods, &c. they shall be considered out of the statute of the 22. and 23. Car. 2. and in such cases the plaintiff, though his damages are found to be under forty shillings, shall be intitled to full costs by the statute of *Gloucester*; but if the Judge think the suit very frivolous and vexatious, he may deprive the plaintiff of the benefit of the statute of *Gloucester*, by certifying under the 43. Eliz. c. 6. by which the plaintiff will be intitled to no more costs than damages, and to less if the Judge thinks fit. And I hope that good statute will be put in practice, as I have led the way by certifying upon it very lately. The next statute relating to costs is the 8. and 9. Will. 3. c. 11. f. 4. for preventing wilful and malicious trespasses; upon which, if any defendant shall be found guilty of a wilful and malicious trespass, the plaintiff shall recover not only his damages, but his full costs of suit, any former law to the contrary notwithstanding. This statute plainly shews, that the Legislature did not understand the statute of the 22. and 23. Car. 2. c. 9. in the same manner as the courts at law did, viz. to confine it to two sorts of actions, but that it extended to all other personal actions; for the statute of 8. and 9. Will. 3. was intended not only to relieve in the very same sorts of actions as the statute of *Charles the Second* did, but gave costs upon a different principle; not to prevent frivolous and vexatious suits, as the statute of *Charles the Second* was, but of all sorts of wilful and malicious trespasses, and that not malicious trespasses in lands only, but of all sorts; and if the Legislature, thro' the statute of *Charles the Second*

(a) 1. Salk. 208. and see Mr. Evans's note to the Sixth Edition of this work.

(b) In the common pleas, Easter Term, 7. Geo. 2. Reported 1. Strange 554.

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took away costs from no trespasses beside trespasses *clausum fregit*, they have no reason to make the statute of the 8. and 9. *Will. 3. c. 11. f. 4.* general, and so be extended to all trespasses. In order to reconcile the two acts of parliament, there has been a construction put upon the latter which I will not adhere to; it is, that the statute of *William the Third* extends only to *clausum fregit*, and the fact is, that there has been no certificate upon that statute but in *clausum fregit*; though the statute is not restrictive in its words, but generally of all trespasses, and made to prevent wilful and malicious trespasses generally. But there are other actions of trespass besides those of *clausum fregit*, wherein I will grant certificates upon this statute, though none were ever granted before. In actions of trespass, indeed, for taking goods and chattels merely, I will not grant certificates upon this statute of *William the Third*, for the absurdity of it. Because, as we have determined that the statute of the 22. and 23. *Car. 2.* extends only to *clausum fregit*, it would be ridiculous to certify in personal trespasses; because, in those, the plaintiff, though his damages found exceed not forty shillings, will have full costs upon the statute of *Gloucester*, except the Judge certifies upon the 43. *Eliz. c. 6.* to prevent his having full costs. The case in which I will certify upon the statute of the 8. and 9. *Will. 3. c. 11. f. 4.* though not a trespass *quare clausum fregit*, is in an action of trespass for a voluntary and malicious assault which is not attended with a battery; for I cannot certify upon the statute *Charles the Second* for an assault only, but I must, by the express words of the statute, certify that the assault and battery were sufficiently proved. Suppose a man draw his sword, and swear he will stab me, and strike at me, but miss me; in this case I cannot certify upon the statute *Charles the Second*, because there was no battery, but I will certify upon the 8. and 9. *Will. 3. c. 11. f. 4.* that such trespass or assault was wilful and malicious, and let the defendant deliver himself from costs how he can. Such a dangerous assault much better deserves a certificate upon the statute 8. and 9. *Will. 3.* than many an assault and battery does upon the statute 22. and 23. *Car. 2.* I shall only take notice of two or three more little cases, which do not come up to or influence the present; such as the cases in *Comb. 420. Carthew, 224, 225. 2. Vent. 180. 195.* All those cases are plainly within the statute of the 22. and 23. *Car. 2. c. 9.* in which case the plaintiff could not have more costs than damages, if the latter were under forty shillings, except the Judge certifies; for in all those cases the trespass was committed upon things, for the trespassing on which the title of the land might come in question; they were either for pulling up or throwing down a hedge, or for digging of the soil, or for stopping a water-course and overflowing the land, all which are trespasses upon the land, and therefore within the statute; and if the Judge would not certify that the title of the land came in question, the Judges did right in refusing full costs. The two cases in 2. *Vent. 180. 195.* are both of them *clausum fregit*, and are not merely personal; and that is the reason which

Lord
Chief

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against
BLADE.

Chief Baron GILBERT went on, in the case of *Butler v. Reeves*(a), a case which was very solemnly determined. It is objected, that the plaintiff shall not have full costs in this case, because part of the verdict is within the statute of the 22. and 23. Car. 2. and that therefore the Judge ought to have certified, that the trespass in the declaration is not only for the taking, breaking, and pulling down of a standard and roller, which are personal chattels, but also for an assault, battery, and wounding; and that as the damages found are under forty shillings, the plaintiff shall not be intitled to full costs, unless the Judge certifies that the assault and battery was sufficiently proved. But I am of opinion, that that will not alter the case, but the plaintiff will be intitled to his full costs without a certificate, notwithstanding the defendant is found guilty of the assault, battery, and wounding; for if that would make any alteration, the defendant would need only to clap it into the verdict, and he will thereby deprive the plaintiff of his costs; but that finding in the verdict shall make no alteration as to costs, since the defendant is found guilty of other things in the declaration for which the plaintiff is clearly intitled to costs without any certificate from the Judge. It is further objected, that the trespass of breaking the roller and standard is such a trespass whereupon the title of the land might come in question, and so a certificate necessary to carry costs, but the title of the land could not, in the present case, come in question; for the statute says, "that the plaintiff shall have no more costs than damages, where the damages are under forty shillings, unless the Judge certifies that the freehold or title of the land mentioned in the declaration came chiefly in question." Now the present trespass committed upon the standard and roller is not laid to be done on the land of the plaintiff, or on any particular land, but only generally in the parish of A which plainly shews that the title of the land could not come in question as the statute requires, and so out of the statute, and no need of a certificate; for a certificate within the meaning of the statute would be impossible to be made in the present case, there being no land laid in the declaration. There was an argument used, that supposing the plaintiff could not have full costs in this case, because his damages are found to be under forty shillings, unless he should intitle himself to them by a proper certificate, yet there being a wounding laid in the declaration, and also found by the verdict, the Court may upon view, &c. increase the damages to above forty shillings, and then, beyond all manner of dispute, the plaintiff will be intitled to full costs upon the statute of *Gloucester*, and needs no certificate. But there has been a case cited, 1. *Raym.* 566. in point, where there was a wounding laid in the declaration, and also found by the verdict, yet held, that it would not carry costs; and the rather not for two reasons; the one, that a wounding is laid in every declaration of assault and battery of course, and it is not material whether the verdict finds any thing

(a) Benb. 207. Gilb. Eq. Rep. 195.

about it or not; for I never knew in my practice, that upon not guilty to the whole count of assault, battery, wounding, &c. that it would be necessary to find the defendant not guilty as to the wounding. A maim or *gravidus* wound particularly laid in a declaration is material, but a general wounding is of course thrown into declarations, and we cannot increase the damages upon a general wounding in a declaration and verdict. Besides, where the damages are only found under forty shillings, the wounding must be trifling and inconsiderable, so that I lay no weight at all upon the wounding. The other reason against the wounding being material is, that the Judge is not bound or concluded by the verdict; because, if he was, there would be no room for a certificate; but the power of certifying is left to the Judge, let the jury find whatever they will, so that the damages given do not exceed forty shillings: and as the Judge is not bound by the jury's finding a battery, he is not bound by the jury's finding a wounding.

I found my opinion upon the reason in the cases of *Venn v. Philips* (a), and *Thomson v. Berry*, without regard to *assortavit* or spoliation; which reason is, that there is no case within the statute 22. and 23. Car. 2. c. 9. s. 136. but trespass *quare clausum fregit*, or assaults and battery; and that in all other cases, a plaintiff who recovers upon a personal action damages under forty shillings, is intitled to full costs upon the statute of *Gloucester*, without any certificate upon the statute of *Charles the Second*, unless he is prevented by a certificate upon the 43. Eliz. c. 6. s. 2. I am therefore of opinion that the plaintiff is intitled to full costs.

ABNEY, *Justice*, was of the same opinion.

BURNETT, *Justice*. I am of the same opinion: the plaintiff in the present case is intitled to full costs. And in order to consider this matter, it will be first necessary to state the verdict, to see what the defendant is found guilty of, for what he is not guilty of may be laid out of the case. It is true, that he is not only found guilty in *A.* of the assault, battery, and wounding, but also for treading upon and spoiling the coals, and breaking and spoiling the standard and roller. Not only in a *mayhem*, but in a wounding specially described in the declaration, or certified by a Judge, or made out by affidavits, the Courts have thought themselves intitled to increase the damages, but the present is a general wounding, and is thrown of course into the declaration. As to increasing the damages, that is not now before the Court, and therefore to be laid out of the present case. The whole will therefore depend upon the defendant's being found guilty of an assault and battery, and of the spoiling of personal chattels, upon which there is no certificate, although the damages recovered are under forty shillings. The question is, Whether a certificate is

(a) Salk. 208.

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necessary to intitle the plaintiff to his costs? The first statute is the 43. *Eliz.* c. 6. and by that in personal actions for assault and battery, or where the title or inheritance of the land is concerned, the plaintiff, though he recover ever so small damages, would be intitled to his full costs upon the statute of *Gloucester*; so he would in all other personal actions for assault and battery, if the Judge did not certify to deprive him of them. But the Judge had a discretionary power to exclude the plaintiff from full costs, where his damages were under forty shillings in all personal actions but those of assault and battery, or where the title or inheritance of land is concerned, for in those he cannot certify to deprive the plaintiff of full costs. And though no certificates have been granted upon the statute of *Elizabeth* till very lately, and by my Lord Chief Justice WILLES, yet many Books take notice that such certificates might be granted (a). The reason why the Judges have always refused to certify upon the 43. *Eliz.* c. 6. has been this, perhaps, That as causes were very injudiciously tried in inferior jurisdictions in the country, the Courts of *Westminster* would not so far resent the plaintiff's coming into *Westminster Hall*, as to certify upon 43. *Eliz.* c. 6. to deprive him of full costs where his damages were under forty shillings, especially as he had an evident right to sue somewhere, as appears by his obtaining a verdict; and they therefore thought it too severe a law to confine men to sue in country courts, where the Judges are frequently so incapable of determining properly, however the defendant was intitled to a certificate upon the 43. *Eliz.* c. 6. to deprive the plaintiff of full costs, if the Judge in his discretion should think the case deserved it. The next statute is the 22. and 23. *Car.* 2. c. 9. f. 136. upon which, although it mention not only actions in assault and battery, and trespass, but other personal actions in general, the construction has been to restrain it to two cases only; which are trespass *quare clausum fregit*, and assault and battery. The reason of such construction was this: The statute enacts, "that in all actions of trespass and assault and battery, and other personal actions, wherein the Judge shall not certify in assault and battery sufficiently proved, or that the title of the land came in question; there shall be no more costs than damages found are under forty shillings." So that though the first words are general, yet the latter words are restrained to such actions wherein there can be such certifying of the battery or the like. *Keble*, who, though an inaccurate Reporter, is a pretty good historian of the law, proves to us, that there was some doubt in the Courts, soon after this act of parliament of the 22. and 23. *Car.* 2. in the case of *Brown v. Taylor* (b). That was an action upon the case for disturbing the plaintiff in his common, and one penny damages, and restitution of costs prayed, there being no certificate on the trial. But it was not allowed; for by the Court it has been resolved by the major

(a) See *Styleman v. Patrick*, 2. od. 741. and the cases there cited.

(b) 3. *Keb.* 37.

part of the Judges of *England*, that the statute 22. and 23. *Car. 2.* c. 9. extends only to trespass, and assault and battery, and not to actions upon the case, or *assumpsits*, or such like. But this book does not only appear possible in those two cases only. The next case is in 3. *Keb. 31.* and the Judges by that determine that the statute *Charles the Second* was not confined to trespass *quare clausum fregit* only, but takes in other personal trespasses. The next resolution is in *Orpwood v. Holden* (a), which is contrary to 3. *Keb. 121.* and agreeable to 3. *Keb. 31.* The next case on the same subject, is *Dicer v. Stanton* (b); but it was adjourned. After these came the case in *Raym. 487. 2. Jones, 232. and 2. Show. 258.* and that was quite like the present case. The trespass was laid generally in the parish, as this is, and not specially in any land of the plaintiff, so as to bring the title in question, and the Court held it out of the statute; and full costs were given, though there was no certificate. Since that case there have been many uniform judgments, where an action of trespass of a personal chattel has been held out of the statute of *Charles the Second*. As to actions of trespass *quare clausum fregit*, for digging of the plaintiff's soil, and pulling up his hedge, &c. or overflowing his land, these being injuries immediately to the freehold, and it being possible for the title of the land to come in question upon such action, the plaintiff shall not have full costs without a certificate, because it is a case within the statute, and whereupon the Judge might certify that the title of the land came in question. But if the plaintiff had declared further, as that besides the breaking and entering the close, and pulling up the hedge, the defendant had carried it away, and the jury had found him guilty of the pulling up the hedge as well as the former, he should have his full costs without a certificate (c). The pulling up the hedge is a plain injury to the freehold, but when it is pulled up and severed from the freehold, it ceases to be part of it, and the owner of the land has it as a chattel; in which case, if the trespasser carry the hedge away, or burn, or destroy it, all these are personal injuries, and out of the statute, and an action will lie, as in the case of spoiling any other chattel. And there is a spoliation of a chattel in the present case, upon which the party might have brought his separate action, and have recovered full costs without a certificate (d).

(a) 3. *Keb. 389.*

(b) 3. *Keb. 469.*

(c) *Com. Rep. 19.*

(d) See *Caruthers v. Lamb, Barnes, 120. Cotterel v. Tolly, 1. Term Rep.*

655. *Atkinson v. Jackson, cited 1. H. Bl. Rep. 295. Mears v. Greenway, 1. H. Bl. Rep. 291. See also Hullock on Costs, 42. 48. 50. where all the cases on this subject are collected.*

Case 359.

George against Kinch.

In trespass, if the defendant justify taking the cattle *damage feasant*, as servant to, and by the command of, his master, and the plaintiff reply a licence from the master, and *traverse the command* to the servant, the replication is *double*, and an issue on such traverse is an immaterial issue; but these errors are aided by a verdict for the plaintiff.
Cro. Jac. 377.
Cro. Eliz. 376.
Yelv. 151.
Cro. Car. 62.
Latw. 1558.
2. Saund. 50.
Fort. 389.

THIS was an action of trespass. The declaration charged the defendant with three several trespasses. One a local trespass, for breaking and entering the plaintiff's close at *Astrue* in the county of *Northampton*, and there taking, chasing, driving away, impounding, and detaining in the pound, five rams of the plaintiff. Another trespass, for breaking, &c. of the said rams, is laid transitorily in the parish of *Astrue* generally, not confining it to any particular land or close of the plaintiff. The last trespass complained of is for cutting and bruising five of the plaintiff's rams.

The defendant pleaded "*not guilty*" as to all the trespasses in the declaration, except the transitory one of taking, chasing, &c. four rams of the plaintiff's: and upon that issue is joined. But as to the transitory trespass of taking, chasing, &c. of the plaintiff's four rams, the defendant justified, and said, that the place in which the four rams were taken, &c. did contain two acres, lying in the common field of *Astrue*, and set forth the abutments and boundaries of the two acres, and that the said two acres were the soil and freehold of *Peter Haines*; and that the defendant, as servant of *Peter Haines*, and by his command, took the four rams doing damage there, and impounded and detained them in the pound, as is charged in the declaration, and was lawful for him to do; which is the same trespass as the plaintiff complains of.

The plaintiff replied, that true it is that the four rams were taken in the said two acres set forth in defendant's plea, and that the said two acres were the soil and freehold of *Peter Haines*; but said, that *Peter Haines* licensed the plaintiff to put in and depasture the four rams in those two acres, and that the rams were there by such licence, until the defendant in his own wrong took, chased, and impounded them; and TRAVERSED, that *Peter Haines* commanded the defendant to take the said rams as servant, and by the command of *Peter Haines*.

To this there is a rejoinder, and an issue taken upon the traverse, and a verdict for the plaintiff upon both issues, and damages to five shillings.

SERJEANT BELFIELD *in arrest of judgment*. The question is, Whether the plaintiff can have judgment upon this verdict and record? It is clear that he cannot; for if he may, it must be for the entire damages found by the verdict, because, as the jury have not distinguished the damages, or apportioned them upon these respective issues, the Court cannot do it. The plaintiff cannot have judgment for the entire damages, because the defendant's justification of taking the four rams *damage feasant* has not been tried, nor can be come at or enquired of by the jury, because of an immaterial foreign issue, which has crept into the record, and has aggravated the damages to some, but to what degree is uncertain.

THE

THE FIRST POINT considerable will be, Whether the second issue upon this record be really an *immaterial issue*, or not?

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THE OTHER POINT: If it be so, Whether it be cured by the verdict, or any of the statutes of jeofails, so that the Court, by means of any of those statutes, may give judgment for the plaintiff without awarding a *repleader* to try the defendant's justification?

AS TO THE FIRST POINT, Such issue is totally immaterial both in law and reason. The case is shortly this: A servant sees the cattle of a stranger trespassing upon his master's land, chases them out, and impounds them, without applying for a particular command from his master for that purpose, for which honest act of the servant the owner of the cattle brings trespass, the servant pleads to the action, and must plead according to the law, that he was servant, and by command of his master took the cattle *damage feasant*, and impounded them, as lawfully he might do; the plaintiff takes issue upon the command of his master to the servant only; and the question is, Whether that is a material point to take issue upon? or, Whether the servant can be said to misdemean himself by taking such punctual care of his master's ground, by driving out trespassing cattle without staying for an express command from his master? He certainly has not misbehaved, for it is his duty to hinder the cattle from doing further damage, and needs not go home to his master for an express command to do that which is inseparably his duty; and for this further reason, because if he were to wait for his master's commands, the cattle might be gone, and the remedy for the *damage feasant* lost; and for this reason it is, that proprietors of land have a right & privilege to distrain in the night, which they cannot do for rent; and he cited *Lee's Case* (a), as express in point. He then cited *Bridgewater v. Bythway* (b): In battery the defendant pleaded a judgment and an execution, and that the plaintiff assaulted the bailiffs, and would have rescued the goods; whereupon in act of the bailiffs, and by their command, *molliter manus imposuit* upon the plaintiff, to prevent his rescue of the goods; the plaintiff replied *de injuriâ suâ propriâ*, and traversed the command of the bailiffs, and the defendant demurred generally; and, upon argument, it was resolved by THE WHOLE COURT, that the replication in traversing the command of the bailiffs was not good, for he might of himself do that to prevent a rescue, which is a tort and breach of the peace.

AS TO THE OTHER POINT, Whether this *immaterial issue* be helped by the verdict, or any of the statutes of jeofails, especially the 32. Hen. 8. so that the Court, by means of that or any other statute, may give judgment for the plaintiff without awarding a *repleader* to try the defendant's justification? he cited to shew that it is not helped, but that a *repleader* ought to be awarded, the case

(a) 1. Roll. Rep. 46.

(b) 3. Lev. 113.

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of *Read v. Dawson* (a); wherein all the Justices were of opinion, that since the making the statute of the 32. Hen. 8. this difference had been always taken and allowed, that when the issue is perfectly material, there shall be no repleader, but that it was otherwise where the issue was not immaterial. And more especially in the present case, there shall be a repleader after the trial of this immaterial issue, because the defendant has set forth sufficient matter to excuse himself from the action, for then there will appear upon the record sufficient matter pleaded, without any verdict to try the truth of such justification; and it would be against common right and justice, that a fair and honest defence appearing upon the record by means of an immaterial issue intervening, shall not be tried, and the defendant thereby be stripped of a fair legal justification. And to this purpose he cited *Pitts v. Polehampton* (b), where HOLT, Chief Justice, takes this distinction: That where the defendant's plea confesses the duty demanded by the plaintiff, and does not avoid it sufficiently, if the issue joined be immaterial, and found for the plaintiff, he shall have judgment, and no repleader shall be awarded; for if tried again, it will do the defendant no good; but if the plea goes in discharge of the action, and the issue is taken immaterially, and a verdict for the plaintiff, a repleader shall be awarded: which distinction reconciles almost all the Books, and puts the thing upon the foundation of law and reason.

SERGEANT DRAPER *on the other side.* The issue in the present case is not immaterial, for the command is traversable. I must admit, that if the issue is immaterial, there ought to be a repleader. If a servant has a general authority to look after the land of his lord, the power of distraining cattle *damage feasant* is implied, for that falls within the general authority; otherwise where the servant has no express or general authority to supervise the land, for there he must wait for a special authority from his master before he can distrain, and therefore a command to distrain in such case being necessary, it is traversable. Upon a former argument, 1. Ro. Abr. 339. C. p. 1. was cited, and Litt. 70. that a bailiff of a manor may either himself take cattle *damage feasant* upon the land, or command others to do it; but this is extremely different from the case of a common servant; for a bailiff of a manor is a high officer, in nature of a sheriff; has the care of all things within the manor; and is invested with great powers and jurisdictions; and differs in his authorities from a common servant as much as possible. The bailiff of a manor may do anything for the benefit of his lord, and his act shall be valid until the lord disagree with it; and the power to distrain cattle *damage feasant* in a bailiff of a manor, arises from his general authority to superintend the manor.

(a) 2. Mod. 139, 140.

(b) 1. Ld. Ray. 390.

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It was objected upon a former argument, that the replication was ill for duplicity, viz. replying a licence from *Peter Haines* to put in the plaintiff's cattle, and traversing the command of the defendant as servant. That the plaintiff should have rested his case upon the licence, which would be sufficient to have proved the defendant guilty of the trespass, and that he should not have traversed the command, for now he has put two matters in issue. But I must submit it, that replying the licence does not make the replication double; for the licence is not replied upon, but is only inducement to the traverse; and if it is replied by way of inducement only, it is not material whether the licence is true or false, and could not be traversed. But supposing there is duplicity in the replication, yet that is cured after verdict, though it would have been fatal upon demurrer.

WILLES, *Chief Justice*, would give no opinion in this, one of the parties in this suit being his tenant, and so himself interested; whereupon he referred it to SIR THOMAS ABNEY and BURNETT, *Justices*.

SIR THOMAS ABNEY desired a day or two to consider of this case before he gave his opinion.

But BURNETT, *Justice*, delivered himself at large, that judgment ought to be for the plaintiff.

BURNETT, *Justice*. I do not think there is any distinction in reality between a master's giving a general or special authority to his servant, though that has been insisted upon to make the present issue immaterial. I always took it that the defendant, where he justifies as servant, is to set forth in pleading a general command from his master, and may give in evidence either a general or special command: and upon such pleading of a general command, though it appears in evidence that there was no command at the time of the distress of the plaintiff's cattle *damage feasant*, yet if the master assented to the distress of the servant afterwards, that shall be sufficient to justify the servant, and will amount to a command precedent, according to the maxim, *Omnis ratihabitor retro trahitur et mandato æquiparatur*. The defendant has pleaded "not guilty" as to the *clausum fregit* or local trespass, and the justification as servant, and taking the cattle by command of his master, goes only to the transitory trespass.

The question is, Whether the plaintiff's replying a licence from the owner of the soil and freehold, and afterwards traversing the command of such owner to the defendant, to drive and impound the cattle, is not immaterial? If the plaintiff had confessed and avoided such command, it would have been sufficient, and he was not obliged to traverse such command, but he might traverse it; for as the command goes only to the transitory trespass, it is traversable. And the distinction as to traversing of commands is laid

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down in *Trevilian v. Pyne* (a), namely, that in *clausum fregit* the command is not traversable; but otherwise in replevin or trespass laid transitorily, as for taking cattle or goods. In trespass *quare clausum fregit*, which is a local trespass, if the defendant justify an entry to the close by the command of or as bailiff to A. in whom he alleges the freehold to be, the plaintiff cannot, in his replication, traverse such command, because it would admit the freehold to be in A. and not in himself, which would be sufficient to bar his action, although the defendant had no such command; for it is not material that the defendant has done a wrong to a stranger, if it be none to the plaintiff. But in case of replevin or trespass for taking goods or cattle, if the defendant justify by a command from or as bailiff to A. in whom he lays a title to take them as for distress or other cause, there it might be material to traverse the command or authority; for though A. had a right to take the goods or cattle, yet a stranger who had no authority from him will be liable; so that both parts of the defendant's plea in this case must be true, and therefore an answer to any part is sufficient.

The case 1. *Ro. Rep.* 46. is, as my BROTHER BELFIELD cites it, that the avowing as bailiff in replevin to the person intitled to the freehold, is not traversable; but the law is now otherwise settled in the case 1. *Salk.* 107. and *ROLLE*, Chief Justice, dissented from the other three Justices in that case in 1. *Ro. Rep.* 46. and cited 33. *Hen.* 6. 3. where is the same distinction as in 1. *Salk.* 107.

As to the plaintiff's replying a licence, and also traversing the command, and, as it is objected, thereby making his replication double, I think that is aided after verdict; and though the plaintiff ought to have rested upon his licence, and only have confessed and avoided the command, and although an immaterial issue is joined in this case, yet that is also aided after verdict, in the case of *Denaj v. Mazey*, in 2. *Vent.* 212.: he stated that case, and then cited *Cro. Eliz.* 456. *Goltsb.* 39. 1. *Sand.* 22. and stated them.

Judgment for the plaintiff.

(a) 1. *Salk.* 107.

Case 360.

Mallock against Eastly.

The lord of a manor, worth one hundred and twenty pounds a-year, the demesnes of which are granted to another for life, is not thereby qualified to kill game within the 22. & 23. *Car.* 2 c. 25.; for the words "having an estate, &c." signify an estate in possession. And *quære*, Whether he is entitled to kill game on the manor, although he be lord of it, unless he be "an officer, or other person of higher degree," according to the statute.—S. C. but not S. P. 3. *Salk.* 291. 3. *Lev.* 227. *Cro. Jac.* 195. *Cro. Car.* 553. 7. *Co.* 17.

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" said now lord the king of the bench here (to wit) at *Westminster*, his certain bill against *Charles Eastly*, gentleman, one of the attornies of the court of our said lord the king of the bench here present here in court, in his own proper person complaining of the said *Charles Eastly* of a plea, that he render to the said *Rawlin*, and to the poor of the said parish the sum of ten pounds of lawful money of *Great Britain*, which he owns to, and unjustly detains from the poor of the said parish, and him the said *Rawlin*; for that the said *Charles*, not being a person qualified according to the law to kill the game, on the thirtieth day of *October*, in the seventeenth year of the reign of our now said lord the king, in the parish aforesaid, in the county aforesaid, had kept and used a certain gun, being an engine to kill and destroy the game, and which gun he the said *Charles* had kept and used for the intent and purpose of destroying the game, contrary to the form of the statutes in that case made and provided, whereby an action accrued to the said *Rawlin*, who as well, &c. to demand and have of the said *Charles* five pounds, parcel of the said ten pounds. AND ALSO, for that the said *Charles* not being a person qualified according to the law to kill the game, afterwards (to wit), on the fourteenth day of *October*, in the seventeenth year aforesaid, at the parish aforesaid, in the county aforesaid, had kept and used a certain other gun, being an engine to kill and destroy the game, and with the said gun did then and there destroy one pheasant, contrary to the form of the statutes in those cases made and provided, whereby an action accrued to the said *Rawlin*, who as well, &c. to demand and have of the said *Charles* another sum of five pounds, residue of the said sum of ten pounds." To which the said *Charles* pleaded, "that he did not owe to the said *Rawlin*, who as well, &c. the said ten pounds, or any part thereof: and of this he puts himself upon the country. And the said *Rawlin*, who as well, &c. likewise."

Upon trial of the said issue so joined, it appeared that the defendant, at the several times when, &c. was seised in fee-simple of the moiety of the manor of *Dacombe* with the appurtenants; the demesnes of which moiety of the said manor, if they were in possession, were worth one hundred and twenty pounds a-year; but at the several times when, &c. all the demesnes of the said manor were leased out to several tenants for ninety-nine years, determinable on the death of one, two, or three persons, under certain yearly reserved rents, amounting in the whole to fifteen pounds thirteen shillings a-year. THAT the said *Charles* was also seised in right of his wife of other lands of inheritance, to the yearly value of thirty pounds, and of other lands in reversion, expectant on the death of his wife's mother, of the yearly value of fourteen pounds.

Whereupon a verdict was given for the plaintiff upon the second count in the declaration, for five pounds, parcel of the said

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debt of ten pounds, for killing a pheasant out of the defendant's manor. And as to the residue for the defendant.

THE QUESTION in law was, Whether the defendant's being so seised of the said manor, lands, and tenements as above, be a qualification?

SERJEANT BELFIELD *for the plaintiff*. The present question depends upon several acts of parliament. The first statute is the 22. and 23. *Car. 2. c. 25. s. 3.* which enacts, "that all and every person and persons not having lands and tenements, or some other estate of inheritance, in his own or his wife's right, of the clear yearly value of one hundred pounds a-year, or for term of life, or having lease or leases of ninety-nine years, or for any longer term of the clear yearly value of one hundred and fifty pounds, other than the son and heir apparent of an esquire or other person of higher degree (a). And the owners and keepers of forests, &c. are hereby declared to be persons by the law of this realm not allowed to have or keep for themselves or any other person or persons any guns, &c. or other engines aforesaid, but shall be, and are hereby prohibited to have, keep, or use the same." There are, however, some anterior statutes for the preservation of the game. The 25. *Hen. 8. c. 11. s. 5.* is a statute to prevent the killing of *wild fowls* at improper seasons, with this proviso, "That it shall be lawful for any gentleman or any other that may dispend forty shillings by the year of freehold, to hunt and take such wild fowl with their spaniels only, without using any net or other engines for the same, except it be a long bow or long bows." The statute of the 7. *Jac. 1. c. 11. s. 7.* made perpetual by the 7. *Car. 1. c.* is made for the preservation of *pheasants and partridges*, and qualifies persons to kill them "which have or shall have free-warren, or shall be lord of a manor or freeholder, who is or shall be seised in his own right, or in the right of his wife, of lands, tenements, or hereditaments to the clear yearly value of forty pounds, or more by the year, over and above all charges and reprises of some estate of inheritance or of lands, &c. in his own right, or in right of his wife, for term of life or lives, of the yearly value of eighty pounds, over and above all charges and reprises, or who shall be worth in goods or chattels four hundred pounds, by him or themselves, or by his or their menial or household servants sufficiently authorised from their masters, to take pheasants or partridges in the day-time only, in and upon their own or their masters free-warren, manor, and freehold, or any part of them." I mention these statutes to shew the proportion that is carried on from time to time with respect to the revenues of persons intended to be qualified. The defendant has not sufficient yearly revenues to be qualified to kill the game.

(a) See *Jones v. Smart*, 1. Term Rep. 44.

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All the lands claimed to qualify him, exclusive of the reversion in the moiety of the manor and demesnes of *Daccombe*, are not enough to make up a qualification: so the single question is, Whether or no a reversion expectant upon a lease or leases for ninety-nine years, determinable on one, two, or three persons dying, is to be considered as having of "lands, tenements, or hereditaments," within the said statute of *Charles the Second*, so as to qualify the reversioner to kill game, his real yearly income being under one hundred pounds a-year, till the reversion falls into possession? It appears from the several statutes mentioned, that a revenue to give a qualification must not be one in expectancy, but a present revenue or income in possession. The statute of 25. *Hen. 8.* says, that the "person qualified must be able to dispend forty shillings a-year." And the two statutes in *James the First's* time say, "that the estate must be of the clear yearly value," which being in the present tense must mean lands in possession. Lands, and the reversion of lands, are two distinct things: one man may have lands, of which another man may have the reversion: the statutes clearly intended, that the qualifications of persons should be agreeable to the income they have in possession. The reason why the Legislature restrained the power of killing the game to particular incomes was, that persons who could not spend so much yearly for their families might not lose their time and neglect their business in the idle diversion of sporting and shooting the game.

MR. SERJEANT EYRE *for the defendant.* There is only one question stated at the foot of the case; yet I will consider it upon two views.

THE FIRST, Whether the defendant as lord of a manor simply, without any regard to his yearly revenue, is not qualified to kill game?

THE OTHER, Whether the defendant's estate, as appears in the case, be not a qualification?

As to the first, Every lord of a manor is qualified to kill game. The proprietors of manors generally were *barons*, and the manor itself composed of demesnes and courts baron. At present, indeed, several persons have manors without any lands, the demesnes having been sold and disannexed; but the property of a manor dismembered of its rents and revenues is still considered as a *royalty* or jurisdiction so favoured as to entitle its master to many privileges, and among the rest that of killing of game. With manors the Crown usually granted free warrens; and though many statutes have been made to preserve the game, under severe penalties, yet lords of manors have been always considered as privileged persons, and qualified to destroy game. The first act of parliament which takes notice of lords of manors is the 1. *Jac. 1.* c. 27. s. 6.
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and that statute recites, "That the game was outrageously destroyed, especially by the vulgar sort of men of small worth, who were not able to pay the penalties;" and enacts, "that it shall be lawful to and for every lord of a manor to keep pheasants and partridges, &c." The second statute is the 7. Jac. 1. sect. 11. to the same purpose as the 1. Jac. 1.; and both these statutes are made perpetual by a statute in the 17. Car. 1. The next statute is the 22. & 23. Car. 2. c. 25. which recites, "That divers disorderly persons, leaving their lawful trades and employments, betake themselves to the destroying of the game with guns, &c. to the prejudice of gentlemen, noblemen, and lords of manors;" for remedy whereof it enacts, "that all lords of manors or other royalties not under the degree of an esquire may, by writings under their hands and seals, authorise one or more gamekeepers within their royalties or manors, who so authorised may seize all guns, &c. for the killing of game within the precincts of such manors, as shall be used by any persons who are by that statute prohibited to use the same: and such gamekeepers may search houses in the day-time, by a warrant from a justice of peace, and seize guns, &c. to the use of the lord of such manor where they shall be found, or otherwise cut them to pieces, or destroy them." If by this statute lords of manors may authorise gamekeepers to kill game and to seize guns, &c. it will be absurd to say, that the lord of the manor has not such power himself, for it would be degrading him below the privileges of his servant. And why does the statute authorise them to make gamekeepers to preserve the game, unless they themselves had an interest in it, and power to take and destroy it, and seize the guns, &c. of unqualified persons? Yet it is clear and settled, that they may carry guns and kill game within their respective manors.

But it may be objected, that no lord of a manor can make a gamekeeper, unless such lord of a manor himself be of the degree of an *esquire*. The import of this word *esquire* is very indefinite. The origin of the name and dignity is very antient and dark. Formerly they were only esquires who had *jus scuti*, or entitled to bear their arms in a shield; but now almost everybody are esquires. In the case of *Carpenter v. Adams* (a) it was determined, that nobody but the lord or lady of a manor can make a deputy to kill game; and if his servant can do it, he himself must be empowered to do it by virtue of his own inherent right. If the lord of a manor kill game out of his manor, he is liable to an action of trespass, but not liable to the penalty of the statute which is now sued for. All the treatises upon the game laws mention lords of manors to be qualified to kill game; and as the present is a penal law, and made for the benefit of lords of manors, it must be

(a) Comb. 183.

expounded beneficially for the defendant. The actual possession of an estate is not the only qualification mentioned in the statute, since that is dispensed with in the case of the eldest son of an *esquire*, or of any person of higher degree, who are qualified to kill the game, although not worth one farthing.

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As to the other question, he submitted it, that the defendant may be said to have an estate of inheritance to the value of one hundred pounds a-year. He has some in possession, and the rest in reversion after the determination of an estate for years. «A reversion is a tenement and hereditament in notion of law, and therefore within the express words of the statute of the 22. & 23. *Car. 2.*; and in the case of pleading a reversion after a term for years, he must alledge that he is seised of it in his demesne of fee; here is no estate of freehold intervening, but only an estate for years; and in law, the possession of the lessee for years is the possession of the reversioner.

WILLES, *Chief Justice*. If the defendant is not qualified, as being lord of a manor, he certainly is not by his estate within the statute of the 22. & 23. *Car. 2. c. 25. s. 3.* neither within the words or meaning of it. The words are, "having an estate;" and a man cannot be said to have an estate when another is in possession of it, and he himself only a *nude* reversion, or at least not attended with rents sufficient to make up his other yearly income a qualifying estate; and it would be a strong thing to say, that a man entitled to a bare reversion of a thousand pounds yearly value after the expiration of a thousand years should be said to be qualified within this act to kill game. But the next words are stronger, "of the clear yearly value;" which must mean payable to him who is intended to be qualified. But this case is less within the meaning of the statute; FOR IT appears from the former acts, and the statute of *Charles the Second*, and the meaning of them, that persons not having sufficient incomes to maintain themselves and families (and therefore the statute fixes the income) should not destroy their time in these idle diversions or occupations of killing the game. If then reversions or remainders were to be qualifications, a hundred people might be qualified by one and the same estate, by limiting remainders properly one after another. Suppose a man has a hundred pounds a-year, and owes as much as it is worth, by the construction contended for he may sell his estate, and still preserve his qualification, for he may sell it for a thousand years; and if the reversion is a qualification, he is still qualified, though a beggar (a).

(a) An equitable as well as legal estate gives a qualification; but the estate, of whatever kind it may be, must be of the value required, clear of all mortgages or incumbrances created by the owner, or

those under whom he claims. *Whetherall v. Hall*, Cald. 230.—See also *Lowndes v. Lewis*, Cald. 188. that a life-estate of less than 150l. a-year is not a qualification to kill game.

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But I have some doubt whether the defendant, as lord of a manor simply, is not qualified to kill game within his own manor. Though the statute of *Charles the Second* impowers all lords of manors not under the degree of "esquire" to empower gamekeepers to prevent the game, &c. and the present defendant is only stiled "gentleman" upon record, yet that will be no obstruction to his qualification, because the subsequent statutes speak of "lords and ladies of manors," without confining them to any degree of gentility; and a lady of a manor cannot bear the title required by the statute of *Charles the Second*; so that at present a lord of a manor may, I think, make gamekeepers, though under the degree of an *esquire*. It seems a little odd, that the servant of the lord of a manor may kill game, and yet the lord himself not do it without being punished by a penalty (a).

ABNEY, *Justice*. In *Cay's Abridgment* of this statute of *Charles the Second* the word "clear" is omitted. This case will depend upon the construction of three acts of parliament. The first is, the 22. & 23. *Car. 2. c. 25. sect. 3.*; the second is, the 9. *Anne, c. 3.*; and the third, the 8. *Geo. 1. c. 19.* The qualification is to be considered upon the first, and is the question of the present case; the penalty sued for is given by the second; and the action upon the last. At present, I think there are three qualifications in force, one of which every man must have to be entitled to kill game. The first is, of lords of manors, who have not a general qualification to kill game everywhere, but are stinted, and confined to the precincts of their own manors; so that it will be considered whether the defendant has not incurred the penalty, as the case states that he killed the pheasant out of his manor: the second sort of persons so qualified to kill game are persons who have titles, as *esquires*, &c. the eldest sons of *esquires*, and of all superior titles; and these are qualified to kill game, whether they are possessed of lands or not, and although they are not freeholders: the third sort of persons qualified to kill game are persons having estates; and I am quite satisfied that the estate of the defendant will not qualify him. This very point was expressly determined in the king's bench upon a very great debate some years ago, where a young gentleman in *Essex*, who had ninety pounds a-year in possession and one hundred and fifty pounds in reversion expectant on the death of his mother, was yet held not to be qualified.

BURNETT, *Justice*, was clear, that the estate was no qualification, but had some doubt as to the other point; for though he imagined that the lord of a manor is entitled to kill game within his manor as well as his gamekeeper, yet he thought he would be liable to the penalty, if he used a gun to destroy game out of the boundaries of his manor. And here it is expressly found, that he killed the pheasant out of his manor.

(a) It is determined, that "an *esquire*" c. 25. though the son of an *esquire* or the or other person of higher degree, as such, son of other person of higher degree is. is not qualified under the 22. & 23. *Car. 2.* Jones v. Smart, 1. Term Rep. 44.

ALL

ALL THE COURT AGREED, that the mere having a gun was no offence within the game laws, for a man may keep a gun for the defence of his house and family, but the party must use the gun to kill game before he can incur any penalty; and they said, this point was settled and determined (a).

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Adjourned as to one point only.

(a) This point was settled in Trinity Term, 11. Geo. 2. Rex v. Gardner, 2. Stra. 1098. 14. Vinet. Abr. 3.— See also upon this subject Rex v. Filer, 1. Stra. 496. Wingfield v. Stratford, Sayer, 15. S. C. 1. Will. 315. Rex v. Hunt, Dougl. 683. motu. Avery v. Hole, Cowp. 825. Rex v. Hartley, Cal. 175. Rex v. Thompson, 2. Term Rep. 18.

Hall against Douglas.

Case 361.

IN ASSAULT AND BATTERY, the plaintiff in his declaration recited the original writ, "that the defendant was attached to answer the plaintiff in a plea, wherefore with force and arms he made an assault upon the plaintiff, and him did beat, wound, &c." And then the declaration goes on, "and whereupon the said plaintiff by his attorney complains, WHEREAS the said defendant, on the eighth day of April, with force and arms made an assault upon the plaintiff, and did beat, wound, &c." There was another count, "AND ALSO that WHEREAS, &c." And the declaration concluded, "whereupon the said plaintiff says, that he is injured, and has suffered damage to fifty pounds; and thereupon he brings his suit." Upon the general issue the defendant was found guilty.

A declaration in trespass *vi et armis*, though by way of recital, viz. "Whereas the said defendant, on such a day, with force and arms, made an assault, &c." is good, in the common pleas, after verdict.

IT WAS MOVED in arrest of judgment, because the declaration is totally recital, and nothing positive against the defendant.

S. C. 1. Will. 99.
S. C. 2. Barnes, 360.
2. Show. 27.
295. 447.
3. Will. 203.
2. Stra. 681.
1162.

DRAPER, Serjeant, for the plaintiff argued, that although the declaration begins with a recital, it concludes with a positive averment that by reason of the two batteries the plaintiff is injured, and has damage to fifty pounds, and therefore the present objection is a trite one; and though there are two or three old Books where it has prevailed, yet by the several modern authorities it is quite discountenanced. In *Daile v. Coates* (a), in trespass, the writ was for breaking the plaintiff's house *vi et armis*, &c. the doors, and taking away his goods; the count was to the same effect, but omitting *vi et armis*, and without saying *bona sua*; after a writ of enquiry of damages awarded, for want of a plea of the return thereof, it was moved in arrest of judgment, FIRST, that *vi et armis* was omitted in the count; SECONDLY, that it was not alledged in the count that the plaintiff had any property in the goods, for it is not said *bona sua*; but the plaintiff's Counsel answered, that in the common pleas the writ was part of the count, and the matters omitted in the count were in the writ; and so the writ shall make the count good,

(a) 1. Lutw. 1509.

for

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for the count refers to the writ ; and the plaintiff had judgment. In the case of *Hardy v. Taylor* (a), error to reverse a judgment in trespass, because the declaration was *pedibus ambulando, &c.* without saying *ad valentiam* in the count : but as this was in the writ, the Court thought it good enough ; and there is a *quare* put by TWISDEN, *Justice*. Whether there is not a difference, as to this, between a suit by bill and original ? In *Warren v. Lapdon* (b), in trespass, the plaintiff declared *quare cum* ; it was moved in arrest of judgment ; but no rule was made, the Court being of opinion, that though the *cum* in the count, if it stood alone, might be bad, yet the recital of the original which goes before helps it. That the present is not to be compared to actions of debt upon bonds, where the declaration begins with recital, as here, "whereas the defendant became bound to the plaintiff, &c. yet the defendant has not paid the plaintiff, whereupon, &c." This is the same case, as it concludes with a positive averment.

MR. SERJEANT PRIME for the defendant, that judgment ought to be arrested, and cited *Briggs v. Sheriff* (c) : That was error of a judgment in the common pleas, in trespass of battery, because the declaration is, "*quod cum, &c.*" because there is no absolute affirmation of the trespass, but only by inference ; but an action upon the latter case is good enough. The reason is, because in trespass *vi et armis* a fine is to be paid to the king by the party for breach of the peace ; and therefore the trespass must be positively averred : but in the latter case damages are only to be recovered, and the defendant amerced. That in actions upon the case, indeed, the consideration is laid by way of recital, "whereas the defendant is indebted to the plaintiff, &c.;" but then there follows a positive averment, "that in consideration thereof the defendant promised, &c. and has not performed, &c."

SERJEANT DRAPER in reply, That the whole declaration in case is recital, and only the breach alledged positively ; that the case of *Briggs v. Sheriff* was cited in *Good*. 251. ; and yet that case, though commenced originally in the king's bench, is adjudged contrary to *Cro. Eliz.* 507. ; that all the other cases he has cited (d) are all of them suits originally commenced in the king's bench, where they declare against the defendant *in custodia marescalli*, and the bill is not part of the count ; and there has been formerly a distinction between suits commenced in the two courts, whereby such declarations have been always aided in this ; and now the king's bench itself holds such declarations to be good, even in that court, and aid it by ordering it to be filed ; and they did so in a late case : so that all these resolutions are overturned.

MR. SERJEANT BOOTLE then stood up as *amicus Curie* ; and said, he was of Counsel in a late case in the king's bench, where

(a) 1. Sid. 250.

(b) Barnes, 174.

(c) *Cro. Eliz.* 507.

(d) 2. Lev. 206. 2. Jones, 197.

2. Salk. 636. Bull. 274. *Cro. Jac.*

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he took the same objection to a declaration there as is made in the present case ; that the Court over-ruled it by ordering the bill to be filed ; and that they would amend the declaration by that : so that now both courts are uniform as to their resolutions, and there is no distinction whether the said suit be by original in the common pleas or by bill in the king's bench, for both courts will now amend.

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WILLES, *Chief Justice*. There are a multitude of antient cases where the words "*quare cum*" and "*quod cum*" in declarations of trespass have been held to be fatal. But the Judges in modern times have been dissatisfied with the doctrines of those cases ; and fearful of directly declaring they were not law, yet very desirous to get over them, they endeavoured at a distinction ; and it has been three or four times determined, that there is a difference between suits commenced *by original* in this court and *by bill* in the king's bench ; and though it might be right to arrest judgment in the king's bench for such a defect as the present, yet it would be otherwise in this court, because the original is part of the count ; and if the original is right, and the count wrong, yet the latter may be helped and amended by the former ; but otherwise in the king's bench, for there the bill is not part of the count ; for there you declare against the defendant *in custodia mariscalli* ; and though the bill be right, yet if the count be wrong, it cannot be amended by it. But if I was in that court, I would break through that distinction ; and I am glad to hear from THE BAR that they have done so in a late case there, by ordering the bill to be filed, and amending the count by that ; for it would be shameful that such an objection as this, after the statutes, should overcome a verdict. As to the distinctions between actions on the case and debt, or why this declaration of trespass of assault *vi et armis* is not as well as actions upon the case or debt, I cannot tell. The principle I go upon is, to prevent the forms of things destroying the substance. If this objection had been assigned specially for cause of demurrer, it might have met with different success ; but as it is made after verdict, it may receive a plain answer, because if there be enough found to give judgment upon, there it is cured ; and I am of opinion, that there is sufficient found to give our judgment according to the justice of the case. The present averment is as good as in all actions of the case ; for in such declarations not only the consideration, but even the promise, the foundation of the action, comes by recital, and under a "*whereas*," and is like the present case. But I shall answer further, that though the averment in the present case is not according to the common form, yet the plaintiff could not obtain a verdict, without proving what comes under the "*whereas*" at the trial. The declaration is, "*whereas the defendant did such a thing to the plaintiff, unde he is damaged* ;" the word "*unde*" is properly translated, "*by reason whereof he received damage*," the jury having given damages ; and they must be by reason thereof, because there is no other laid for them to give damages upon. It is the same thing as though it had been
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averred at first, but the last words first; and suppose the declaration begun, "the plaintiff is damaged in twenty pounds, by reason that the defendant beat him," this would be a good averment; and the present case is like it.

ABNEY, *Justice*. I remember it was always mentioned in the king's bench, that such declaration as this was good in this court, though bad in that: the form of declaring in the courts was conceived to occasion the difference; here there is an original, but there there is none. But I am now glad that they help such declarations in that court after verdict by amendment, by ordering the bill to be filed. I agree with my LORD CHIEF JUSTICE in everything.

BURNETT, *Justice*. I remember the case of *Franklyn v. Reeves* cited by my Brother; and the conclusion LORD HARDWICKE came to was, that as in the common pleas he took the writ to be part of the declaration, he would send for the original by awarding a *certiorari*; and when that comes here, we shall have the same foundation to amend by as the court of common pleas would; and the judgment was affirmed.

THE COURT. Rule for arrest of judgment must be discharged (a).

(a) See *White v. Shaw* in the common pleas, where a declaration in trespass *vis et armis* "quod cum, &c." was held good on a special demurrer. 2. Will. 203.

Case 362.

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In what case a common recovery cannot be amended.

S. C. 1. Will.
35. 42.

THE FOLLOWING RULE was obtained to shew cause why a recovery should not be amended: "TUESDAY, the seventeenth day of April 1744, *Easter Term*, in the seventeenth year of George the Second, upon reading the record of the recovery suffered between the said parties in *Easter Term* 1740, and the indenture declaring the uses of the said recovery, IT IS ORDERED, that *Watkin Wynne, Esq.* and *Jane* his wife, which said *Jane* claims title to the remainder of the premises comprised in the said recovery, upon notice of this rule to be given to them, shall shew cause to this Court, on *Thursday* the twenty-sixth day of *August*, why the record of this recovery should not be amended by striking out the words "at which day," relating to the return of the writ of summons to warrant, and inserting instead thereof the words following, "before which day, that is to say, on the fifth day of May, in the same Term," upon the motion of the following Serjeants, WILLES, WYNNE, HAYWARD; and DRAAPER, for *James Apperley* the surviving vouchee, and for the demandant and tenant.

And now in *Trinity Term*, in order to induce the Court to the above amendment, the affidavit of *Mr. Thomas*, who was employed by *Dr. Apperley* and his wife to suffer the recovery, was read, and ran thus:

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" THOMAS THOMAS swears, that being employed by Dr. Apperley to suffer a common recovery in several manors, &c. in which Watkin Wynne, Esq. and Corbett Kynaston, Esq. are demandants, the said deponent Thomas Thomas tenant, and the said Dr. James Apperley and Alatheia his wife the vouchees, he, the said deponent, did, some time in the month of April 1740, issue out and send down unto Dr. Apperley a writ of *dedimus potestatem*, directed to certain commissioners therein named, to take the warrant of attorney of him the said Dr. Apperley and Alatheia his wife; and the said warrant being taken and acknowledged, the same, together with the said writ of *dedimus*, were returned to the said deponent, in order to have the said recovery arraigned at the bar; and that the said deponent having prepared a proper *præcipe* at bar, he attended at the bar of this honourable Court, on the fifth day of May 1740, with the said *præcipe*, *dedimus*, and warrant of attorney, and the said recovery was then and there arraigned according to the usual form of arraigning recoveries; and the said recovery being so arraigned as aforesaid, the said deponent did, on the seventh of May, compound the writ of entry in this cause (which writ is tested the second of April, in the thirteenth year of George the Second, and returnable from Easter Day in fifteen days, as appears by a copy of the said writ in the deponent's custody, who upon the seventh of May aforesaid paid unto Mr. Stephen Wicking, who acts as deputy-receiver of the fines or king's silver, the composition-money or king's silver paid upon the said seventeenth day of May; for that it appears by the said defendant's day-book, wherein he makes an entry of the several sums of money he lays out for his client's account, that he paid, on the said fifth of May, for passing the recovery in this cause at bar and for court fees, the sum of nineteen shillings, and that he paid the composition-money or king's silver on the seventh of May to the amount as above). But after judgment and execution of this recovery, Watkin Wynne and Jane his wife come into the court of king's bench, and bring their writ of error, suggesting, that the said James Apperley and Alatheia his wife, the vouchees in the said recovery, at the time of prosecuting the writ of entry, were seised of the said manors, &c. in their demesnes of fee tail, that is to say, to the said Alatheia and the heirs of her body, remainder to the said Jane, the wife of the said Watkin, and to the heirs of her body issuing; and Watkin and Jane his wife assign for error, that Alatheia died at Shrewsbury on the tenth day of May, which is before the rendering of judgment, and that she never had any issue of her body, and so the judgment is erroneous; and pray for such error the judgment may be revoked and annulled, and that the said Watkin and Jane his wife to all that they had lost by the rendering of that judgment may be restored. Watkin Williams Wynne, the surviving demandant, being warned into the king's bench, takes issue, that Alatheia did not die before judgment: which issue went down to be tried; and the jury at

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" *Shrewsbury* found a special verdict, that *Alathea* died on the tenth of *May*, but know not whether that was before judgment, but submit it to the Court. After two arguments of such special verdict, the Court of King's Bench were of opinion unanimously, that *Alathea* died before judgment, till they had applied to the court of common pleas to have the recovery amended in the manner as is above stated."

SKINNER, PRIME, and BOOTLE, *Serjeants*, shewed cause against the amendment; and there were some affidavits read, that the Court should not favour *Dr. Apperley* in this amendment, because he was no purchaser for a valuable consideration, but a mere volunteer; and though he married a lady with so large an estate, and had a large fortune of his own, yet he made no settlement upon her; that the plaintiffs in error were entitled to this remainder after an estate-tail which is now spent; and that such remainders are valuable things in equity; and cited 2. *Vern.* 551. 1. *Wms.* 470. 485.

SKINNER, *Serjeant*. Although common recoveries are favoured as common assurances, and though amendments have been allowed even after a recovery has been suffered thirty years, yet the present is such a case as is not entitled to it. The forms of judicial proceedings are to be kept up, lest it be a temptation to clerks to grow negligent in the entries. In *Palm.* 228. it is said, when recoveries are suffered by those who are enabled to do so by law, they are to be favoured, otherwise they are to be taken strictly. The person here was enabled to suffer a recovery; but this is not sufficient, without complying with the modes the law prescribes in its conveyances, although there appeared a plain intention in the parties to suffer this recovery. Bargains and sales without enrolment, or releases without antecedent leases for a year, will not pass estates, let the intentions of the parties appear ever so strong. The mistakes or mere *vitia clerici* may be set right, if there are proper things to amend by, or it appears that the instructions are right; they must, however, be shewn: but the ignorance of clerks is never amendable. There is nothing here to amend by. The instructions to the clerk or deed to lead the uses cannot help this record, nor is there any one part of the rolls whereby the present amendment can be granted, for there is never any entry or memorandum at what day recoveries are arraigned at bar. Where the tenant comes in person to the bar, and vouches to warranty, if the vouchee do not appear the tenant prays a summons to warrant, and it is awarded to fetch in the vouchee; but in this case the prothonotary only enters the appearance of the tenant; and judgment, where there is such summons, cannot be given till the return thereof. But the prothonotary never enters the appearance of the vouchee, where there is a summons to warrant; so nothing appears upon the roll when the vouchee did appear; if not, then this amendment cannot be made, that the vouchee appeared on the fifth of *May*, because the record can give no insight to such alteration;

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tion; and *Mr. Thomas's* affidavit, which is only a matter *in pais*, cannot be received as authentic enough to alter a record, which ought only to be rectified by some part of the record itself, or at most by the indentures to lead the uses, and not by affidavits, which were not part of the transaction, but made long after the recovery was completed and everything closed. He then cited *1. Leon. 86.* where it was moved by *Serjeant Walmesley*, if a common recovery be to pass at the bar, and the tenant is ready at the bar, and vouches to warrant *A.* for whom one is ready at the bar, and the tenant is ready at the bar to appear for the vouchee by his warrant of attorney, it was held, that this appearance was merely void, for in such case the vouchee ought to appear in person, because there was no summons; but where summons issueth, and the same is entered upon the roll, there the vouchee at the return may appear in person or by attorney; and this was the clear opinion of all the Justices, and also of the prothonotaries. In the present case there is a summons to warrant, which was not returnable till the sixteenth of *May*, and the vouchee could not appear either in person or by attorney till then. It happened she died on the tenth of *May*, which was before the return; and the amendment prayed for is, that she appeared by attorney on the fifth of *May*, and so judgment given before her death. If this amendment is made, it will purge one error by making as great a one, *viz.* that the vouchee appeared by attorney before the return of the summons to warrant, which will make the recovery void, according to that case in *1. Leon. 86.* It is quite reasonable that where there is a summons to warrant, the vouchee shall not appear, either in person or by attorney, till the return thereof, because the cause is continued to the day of the return of the summons, by entering, "that the same day" (the return day of the writ of summons) "is given to the parties aforesaid;" so that if the vouchee could appear before the return of the summons, it would be a surprise upon the demandant, who does not expect to count against the vouchee until the day given by the Court to all the parties, which is the day on which the summons is returnable.

MR. SERJEANT PRIME against the demandant. I do not know but as this estate was the wife's, that the recovery suffered by her was a void act, for the warrant of attorney may be presumed to be given by composition; for the *dedimus potestatem* requires no separate examination, but is general to take the warrant of attorney of the husband and wife; and the wife might comply *propter terrorem*. Though fines and common recoveries are the highest public assurances, yet there are frequently such defects in them as the Courts think incurable; and they are frequently reversed by writs of error. In *Sir Nicholas Bacon's Case (a)*, a recovery was held to be erroneous, and reversed, for a mistake something like the present. This Court goes further in the amendments of fines and recoveries than of adversary proceedings; but there

(a) Dyer, 220.

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are no instances of amendments of recoveries but where all the parties or their representatives who are interested assent, or where the party who prays the amendment has great equity on his side by paying a valuable consideration. The present case is stripped of all those ingredients; for *Dr. Apperley* is a volunteer only, and the amendment is opposed by the persons in remainder. The recovery is out of court, for the writ of error has removed it into the king's bench, and the roll here remains as a dead letter. And there is no ground to say we surprised *Dr. Apperley* by removing it without notice; for there was an application by us to this Court, upon the authority in 2. *Vent.* 90. to set aside this recovery for irregularity, which was some notice. The case in 2. *Vent.* 90. is thus: *Sir Thomas Gower* had, upon a commission, made an attorney in order to suffer a recovery in the succeeding Term; and in that Term the Court was moved, in behalf of the heir in tail, to stop the passing of the recovery, upon several affidavits that *Sir Thomas Gower*, since the making an attorney, was dead in Ireland; and the Court, being satisfied of the truth thereof, did stay the passing of the recovery, because if it should pass it would be erroneous. But we in our case made our application too late, because the recovery was perfected; and our motion was denied, the rather, because *Alathea* dying before, the rendering judgment was error, and the recovery might be reversed upon a writ of error. After all this notice, the defendant in error lay by, suffered the recovery to be removed, errors to be assigned, took issue upon them, and let a special verdict be found, and never applied for an amendment till the Court had given their opinion against them. As to the amendment itself, he submitted, that this was a fact which was not amendable. A record containing an act of the party, as his appearance or non-appearance, nonsuit, default, or such acts, when once recorded, is not amendable. Acts of the Court are amendable, as appears from 2. *Salk.* 567. 5. *Mod.* 398. but not acts of the party. In amendments of recoveries, indeed, the Court has gone further than in other cases; but this always either on the ground of assent or equity. This Court in common recoveries has amended the omission of parcels which has been the fault of the parties themselves, and not of the officers of the court; for it has been done where the parcels have been omitted in the instructions given to the officer; which is carrying the statutes of amendments beyond all the rules in *Blackmore's Case* (a). Still such amendments must be agreeable to the truth of the fact. But that which is now prayed for contradicts the truth; for it is attempted to alter the record, and to say, that the vouches appeared by attorney on the fifth of May, which is impossible, for there was no warrant of attorney then in court; for that was not sent here by *mittimus* out of chancery until the eighth day of May; and nobody can take notice of the warrant of attorney till then.

(a) 8. Co. 156.

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SERJEANT BOOTLE *to the same purpose*; adding, that the case of *Wynn v. Lloyd* was not quite like the present, for the Court intended, that the vouchee came in person and made an attorney in court, and presumed the summons to warrant in that case to be a nullity; but there can be no such intendments here, for *Mr. Thomas* swears that *Mrs. Apperley* appeared by virtue of that warrant of attorney; that he came to the bar and had the recovery arraigned; and this takes off all the presumption that she either appeared in person or made an attorney at bar, or any other warrant of attorney than what is stated to be founded upon the summons to warrant.

WILLES, *Chief Justice*. Most of the objections against this amendment may be laid out of the case. And first, that of *Dr. Apperley's* being a volunteer; for we shall not determine upon equity, but upon the right, as it appears before us. The length of time may also be laid out of the case, for that is not above three or four years, and we frequently amend recoveries after forty years. As to the objection, that there is nothing to amend by except *Mr. Thomas's* affidavit, and that that would be dangerous to steer by, it being no part of the record; considering the nature of the case, I think that is a proper thing to amend by. If parcels are omitted being put into a recovery, we will not suffer them to be added, or the recovery to be amended, upon affidavit, because that is not the best evidence that can be got, because the deed to lead the uses is a better. So if a clerk mistake his instructions, or omit anything out of them, we will not suffer things to be verified and set right by affidavit only, because the instructions themselves are better evidence. But the best and the only evidence we can have of the time of arraigning this recovery at bar must be by affidavit, for there are no minutes, either by the SERJEANTS or the prothonotaries, in their passing recoveries, to ascertain the precise time or day in which they are arraigned and suffered. Indeed, there is a case in *Pigott's Recoveries*, that the affirmation of THE SERJEANTS is not to be regarded, and that nothing is to be so but what appears upon the record. But that is false. I have been at the pains to read that treatise quite through, and never met with one more fruitful of errors in my life, among which the above is an egregious one. *Mr. Pigott* was a very learned man, and would have blushed to have published anything so inaccurate; but it is a posthumous work, and therefore it is no wonder that it is no better than what it is. I mention this that young gentlemen may not be misled by it. There then appears to be sufficient proof that this recovery was arraigned at bar on the fifth of *May*; and we shall not scruple to make the amendment prayed, if it will be significant, and set the recovery right; but we will not make a nugatory amendment, or rectify one error by creating a fresh one, which would oblige the parties to assign new errors in the king's bench. Here are no affidavits that *Mrs. Apperley* appeared in court from the beginning to the completion of this recovery; and we can presume nothing in our own court, where recoveries are suffered, but what is verified to us, though

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we can presume in many cases what is done in other courts. If she had appeared in person on the fifth of *May*, I think this recovery might have been made valid, for then she might have appeared before the return of the writ of summons to warrant, and all would have been well. But as she has only appeared by attorney, he had no day in court till after the return of that writ, which was not till some time after her death; and his appearance after her death is error in fact, because death is a revocation of his power of attorney; and if we alter the record, and say he appeared before her death, that will, I am afraid, be error in law, because it will be an appearance when he had no day in court.—Let this be spoke to again next Term by the Counsel for the amendment. We will effectuate the recovery, if possible.

This case did not come on to be argued again until *Hilary Term*, in the seventeenth year of *George the Second*, 1744; and then it was argued by *Serjeants WILLES, HAYWARD, and DRAPER*, in succession, as follows.

WILLES, Serjeant, Recoveries are the favourite children of this court, as they are the general assurances of the nation; and it is for the end of supporting them that the Court presumes tenants to the *precipes* and surrenders of life-estates, when no such appear. The present recovery is entered up wrong in fact; and the Court will not suffer an entry which is false in fact to stand upon a record, because to do so would be to destroy it. The common amendments of inserting names of places and persons are stronger than what are now prayed; and yet such amendments are numerous, and in daily use. When a township or place is inserted which was not in the writ of entry before, it is in fact making a recovery of such added lands of which there was no plea depending before, and yet the Court does them without scruple. Of liberal amendments made in common recoveries he cited *Pigott*, 167, 168, 169, &c. It is objected to us, that if we obtain our amendment, we shall be only purging one error at the expence of erecting another; which will be as fatal, because the amendment prayed is, that the attorney for the vouchees appeared before the return of the writ of summons, which he could not do, having no day in court till then. It is clear, that the vouchee might have appeared in person before the return of the summons, and the recovery suffered thereupon would be good; and the Court may be said to have accepted of such appearance. To this purpose is the case of *Gravener v. Massey*, in 1. *Leon.* 291. where a writ of error was brought to reverse a common recovery, and error was assigned, because the vouchees appeared by attorney the same day they were vouched, which they ought not to do by law; but they might appear *gratis* the first day, without process, in their proper persons: and *Coke* as to this said (who was only a Counsel), that although the vouchees cannot appear thus by attorney, yet when the Court had admitted their appearance by attorney, it is well enough, and no error. As to the case in 2. *Vent.* 90. there

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Sir Thomas Gower died before the return of the writ of entry: though an attorney was appointed by *Sir Thomas Gower*, yet that attorney never appeared in the life-time of his constituent, which is not the present case, for here the attorney appears in the life-time of *Mrs. Apperley*. As to the case of 1. *Sid.* 94. the party died before the return of the writ of covenant, and the fine was reversed, because there was no cause in court, nor was there anything upon record for it to attach its jurisdiction upon. The case in *Salkeld* was a fine also reversed upon the same ground. He concluded with citing the case of *Wynne v. Lloyd*, in 1. *Lev.* 130. and insisting strongly upon it.

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WYNNE, *Serjeant, for the amendment.* The question will be, Whether the recovery will be right, if we should obtain our amendment as prayed? And that will depend upon this, Whether the vouchee may appear at the return of the summons? It must have been pursued, and he could not have appeared otherwise, or before such time. But the directory part of the *dedimus* is not tied down to such time, but is to appear generally. The writ of summons is not an original writ, but a mere judicial one of this court only; it is only a writ of form, as many other writs are, as prohibition, and writs of consultation. They are seldom sued out; or if sued out, they are never served; for, To what purpose would it be to serve them? for the suffering of common recoveries is no adversary proceeding, nor is the process of the summons to warrant to compel an involuntary person to appear; but it is for the benefit of the vouchee himself, and for his appearance whose interest it is to have the recovery suffered; and therefore to serve the summons upon him would be absurd. The vouchee in fact wants no summons; he may be always supposed ready to vouch, and to accelerate his own proceedings; and he may appear in person *gratis* at a shorter day than the return of the summons; and there seems to be no reason why he may not do the same by attorney: and there is no more inconvenience in the one case than in the other. At common law, a man cannot make an attorney at all to appear for him, nor could the Court receive one without licence from the Crown to make an attorney and to receive him; but the *statute of Carlisle* introduces *dedimus potestatem* to make attornies; and when attornies are constituted, they are in the same place, and have the same power, with their principals. The words of the warrant of attorney are strong to this purpose, viz. *ponent. loco suo*, to gain or lose in such a plea. The reason why an attorney may appear with or without warrant is, because he is liable to a writ of deceit to his principal if he appear without warrant; and if he appear with warrant, and misbehave, the Court can punish him by attachment, or the party who is injured may set aside the proceedings if they are irregular. *Palm.* 229. *Booth*, 251. *F. N. B.* 213. 227. and the *Register*, where there are forms of writs *de attornato faciendo et recipiendo*. In *Raym.* 70. it is said to be the constant course of suffering recoveries in *Wales*, or levying fines. I have looked into the practice of the courts in *Wales* and *Booth*,

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which are books of authority, and cannot find any such custom, so that the case of *Wynne v. Lloyd* is in point.

THE COUNSEL for the amendment, conscious that such amendment as was prayed by the rule would be of no avail to them, because though it would cure one error it would plant as fatal a one in the room of it, now applied for a new sort of amendment, viz. to alter the *teste* and return of the writ of entry, and of course the *teste* and return of all the other processess, in such manner as to have the summons to warrant returnable before the day on which the recovery was arraigned at bar by attorney, and then all would be right; and to this end they prayed, that the writ of entry might be *tested* in *Hilary Term*, and made returnable *Crastino Purificationis* of the same Term; and the writ of summons, instead of being returnable on the morrow of the *Ascension*, which was the sixteenth of *May*, may be altered and made returnable in a month after the day of *Easter*, which was the fourth of *May*, in the life of *Alatheia*, and when the attorney had a right to appear.

HAYWARD, Serjeant, for the amendment. The deed to make a tenant to the *præcipe* is dated early enough for these alterations, for it is dated the third of *February*; and it mentions that one or more perfect common recoveries be had and perfected before the end of *Easter Term* next ensuing the date thereof, or any subsequent Term. The present recovery was arraigned at bar on the fifth of *May* that year, and the course is, that the recovery is passed at bar before any writ of entry is sued out or anything else done; and as the several writs were taken out after the suffering the recovery at bar, if their *testes* be mistaken, or not made agreeable to such recovery, they are the *vitia clerici* and amendable, because the parties have done everything in their power to suffer a recovery in pursuance to their deed, and it would be cruel that the mistakings of the clerks should disappoint them. But then it is asked, What we would amend by? The deed to lead the uses of the recovery, the passing it at bar, the minutes of the prothonotary, are all of them grounds to amend by. Instances are frequent of amending writs by minutes left with the curfitor. Pleadings have been amended in my memory by the draughts of Counsel in the king's bench. There have been two methods of amending this recovery proposed; the former, according to the rule, by entering the appearance of the parties upon the fifth of *May*, and that judgment was then given; the latter, and more eligible one, to alter the *teste* and return of the *præcipe* or writ of entry, and the *teste* and return of the summons to warrant. Before I enter into the argument of this latter amendment, I shall not mention what alteration it will make in the several records: If the writ of entry is amended in the *teste* and return, and made returnable on the morrow of the

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Purification, which was the third of *February*, then there will be a good tenant to the *præcipe* by the deed, and then there must be entered upon the *Hilary* roll the court, and the appearance of the tenant in person, and the vouching of *Dr. Apperley* and his wife to warrant, and day given for them to appear by attorney: in the paper books, that which is now entered upon the first of the rolls of *Easter* must be entered in the margin roll of *Hilary* as of the third of *February*, being the morrow of the *Ascension*; and then the first roll of *Easter* must be vacated, and that can be only done by entering in the margin of it "*vacatur per Curiam*," or "by order of the Court;" then the second roll of *Easter*, which begins with the *mittimus*, will remain as it is, only altering the *teste* of the *mittimus* and the return of the writ of summons recited in the *dedimus*; the *mittimus* does not mention the return of the writ of summons, so that the only alteration upon this second roll of *Easter* will be, instead of the words "morrow of the *Ascension*," to insert these words "in a month from the day of *Easter*;" and instead of the words "of the said Term," to insert the words "of the Term of *Saint Hilary* last; then the consequence of the whole will be, that if the summons to warrant is made returnable in a month from the day of *Easter*, and the appearance by attorney upon the same day, then the judgment will be given upon the same day, which was the fourth of *May*, when the wife was alive, and the attorney had a day in court to appear in. There is no amendment to be made in the warrant of attorney or caption of it; but the *dedimus* and warrant being filed with the curfitors to make out the *mittimus*, they will appear to be right.

As the record now stands, it appears that *Alathea* was alive after the return of the writ of entry, after the *teste* of the *dedimus*, after the caption of the *mittimus*, and after the arraignment the recovery, but that she died before the return of the writ of summons: it is entered that she appeared indeed after the return of the writ of summons; this is contrary to the truth of the fact, and what is prayed is only such an amendment agreeable to truth: and it is pretty hard, where parties have done all mesne acts required by law in order to make a good recovery, that all this is to be defeated by a past entry contrary to the truth of the fact. The present case does not differ from the common ones of judgments in debt, where the plaintiff, in case he has mistaken any entry, may move to amend, and it is commonly allowed him. The warrant of attorney is part of the record, and so mentioned in *Pigott*, and therefore is amendable as such. With regard to the appointing attorneys in suits by warrant, no man could do it at common law, but by the king's writ, or in person in court: in *F. N. B.* 59. *Reg.* 21. there are many *dedimus's* to empower persons to make attorneys, and they issue to the Judges or commissioners. As to the other method of appointing attorneys in court in person, we had an instance of it last Term, when a nobleman came into court and appointed an attorney. The method

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method of appointing attornies by *dedimus* was found very inconvenient and expensive, and is remedied by the statute of 15. *Edw.* 2. and other statutes which are in ease and aid of the proceedings of the courts of justice; and they are only general commissions to all the subjects of *England* to do that without particular commission which at law they could not; and therefore when a warrant of attorney is filed in this court, it is considered as if the constituent was in court and appointed the attorney in court, and said, "I put you in my place as my attorney in this court," and as if the officer took this warrant from the constituent's own mouth. The warrant of attorney, in recoveries, is not to appear until the return of the writ of summons, and the *dedimus* to make an attorney recites a summons; but such suggestion is immaterial and not traversable, for the summons is only a process founded upon the original to bring a vouchee into court, and when he appeared it is to the original and not to the process. The process is out of the case when the party appears, because the process is then answered; and therefore mistakes in process are cured, and cannot be assigned for error (a). Though a summons is not well made, yet if the party appear it takes away error; and so if he is not summoned at all and appears (b). This is the common case of every original; as if a *capias* be returnable at a future day, and the party appear before the return day, such appearance is good. He then cited 3. *Mod.* 140. 5. *Mod.* 17. *Keilw.* 566. *Dyer*, 220.

THE COURT took much time to consider of this case, and did not deliver their opinion until the last day of *Easter Term*, in the eighteenth year of *George the Second*, 1745; when,

WILLES, *Chief Justice*, spoke as follows the opinion of himself, as well as of MR. JUSTICE ABNEY and MR. JUSTICE BURNETT, who were present in court.—In order to consider this amendment, it may be proper, in the first place, to state how this recovery stands; in the next, what the real facts are; and lastly, the amendments prayed,

The recovery stands thus: It is a recovery of *Easter Term* 1740. The writ of entry is returnable *quindenā Pasche*, which that year was the twentieth of *April*, so that the twenty-third of *April* following was the first day of Term, and the appearance day; at which day it is said upon the record "that *William Thomas* the tenant comes in his proper person and defends his right, when, &c. "and thereupon vouches to warranty *James Apperley* and *Alathea* his wife, summoned in the county aforesaid; let him have them here on "the morrow of the *Ascension*," which in that year was the sixteenth of *May*, after *Alathea's* death. "The same day is given here to the "parties aforesaid; and hereupon the said *William Thomas* puts in his

(a) *Danv. Abr.* "Error" 69.

(b) *Cro. Eliz.* 582. *Cro. Jac.* 311. 1. *Sid.* 406. or 416.

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“stead *Edward Preeft* and *Thomas Steward*, his attornies jointly “and severally, against the demandants in their proper persons, as “the said tenant by his attornies afore said; and the said vouchees “*Dr. Apperley* and his wife being summoned by *Josiah Hodgson* “their attorney, likewise come and freely warrant the manors, &c.” This is that part of the recovery of which an amendment is prayed by the rule. As this recovery now stands, it must be taken to be suffered on the morrow of the *Ascension* and not before, which in that year was the sixteenth of *May*, when *Alathea* was dead.

As to the fact: it appears upon affidavit, that the writ of entry was tested the second of *April*, and made returnable the twentieth of *April*, which was the first return day of *Easter Term*; the writ of summons to warrant was tested the twenty-third of *April*, returnable on the sixteenth of *May*; and it could not be returnable sooner because there must be five returns inclusive between the tests and the return of the writ of summons to warrant; and at common law there must have been nine returns inclusive, but these are now abridged by statute to five returns, and there need be no more. The *dedimus potestatem* to take the warrant of attorney was tested the twenty-fifth of *April*, and the warrant of attorney executed by *Dr. Apperley* and his wife on the thirtieth of *April*. The *dedimus*, the caption of it, and the warrant of attorney taken thereon, were sent into court by *mittimus* out of chancery, tested on the eighth of *May*; and it has been proved upon error in the king's bench, and now admitted, that the wife of *Dr. Apperley* died on the tenth of *May*. It is proved by affidavit, that the recovery was arraigned at bar on the fifth of *May*, before her death; but at the same time it is admitted that she never appeared in person, neither at the return of the writ of entry nor when the recovery was arraigned, so every thing was done by warrant of attorney only. It appears, that the deeds of lease and release, in which is a covenant to suffer a common recovery and also a declaration of the uses, bore date the first and second of *February*, before the recovery suffered, and executed on the day, or very near the day, on which they are dated.

The objection is, that *Alathea* died before the sixteenth of *May*, on which it appears, by the record, that the recovery was suffered; that she being dead when judgment was given, the warrant of attorney ceased and became void; and the recovery being suffered upon a void warrant must be void also.

But in order to cure this, two amendments have been prayed:

The first, that instead of “at which day,” which must be taken to be the return day of the summons to warrant, “the sixteenth “of *May*,” on which the recovery was in fact suffered, may be inserted.

The other amendment prayed, when the first would not serve, is, that the tests and return of the writ of entry to make it returnable *crastino Purificationis*, which was the third of *February*, and that the summons to warrant may be made returnable the third return
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of *Easter Term*, which was the fourth of *May*, and then all would be regular.

As to the first amendment prayed, there is sufficient foundation in fact to make it, if it would be effectual; but we are all clearly of opinion, that if the record was to be so altered, it would be worse than it is now, and we will not cure one error by giving birth to another, and perhaps a greater; for we are all of opinion, that a vouchee cannot appear by attorney until the return of the summons to warrant. The two cases cited prove this, and besides it is supported by the reason of the thing: 1. *Leon. 86.* is expressly to this purpose, where it is held, that in common recoveries the vouchee cannot appear by attorney until the return of the writ of summons to warrant. This authority has been much attacked by the Counsel for the amendment, who have said the case is anonymous, and only a sudden opinion given by the Court upon a question demanded by a Serjeant from the Bar: that was no unusual method formerly, though it is become so now; but we think that to be a great authority, because it is said to be the clear opinion of all the Judges and prothonotaries, never contradicted since, and supported by a very antient case, *Bro. Jour. pl. 39.* where it is expressly said, that the vouchee cannot appear by attorney but at the day given by the process. Objections are again made to this case, that it does not appear whether this is spoke of a common recovery or of an adversary suit; but that would make no difference, for rules relative to process are the same in adversary suits as in common recoveries: the statute of 16. *Car. 1. c. 6.* shews this, which puts both sorts of suits upon the same footing, as to the five returns made still requisite in processes in real actions. Besides, in the present case, this rule is justified by reason and the fact before the Court; for it is admitted that the vouchee did not appear in person either at the return of the writ of entry or other time, and that she never was in town during this transaction; and therefore there was a necessity to issue a warrant of summons to warrant, and a like necessity, as she never was in town, that her appearance must be by attorney; and if she never appeared in person, there was no day given in court for her to appear in but the sixteenth of *May*. The law, which requires five returns to a warrant of summons, would become ridiculous if the vouchee could appear by attorney before the end of the five returns; but we are all clearly of opinion, that the present being an appearance by attorney, and so admitted, the attorney could not appear before the return of the writ of summons to warrant.

A case much relied on, in favour of the amendment, is that of *Wynne v. Lloyd (a)*; but that is no authority as to the first amendment now desired: first, because it is difficult to know the fact in that case, for none of the Books agree in it: in the next place, because that is not like the present in this point, because

(a) 1. Lev. 130. 1. Sid. 213.

there is no pretence in that case that the vouchee appeared before the return of the writ of summons: that was a question which did not arise upon a motion to amend, but was an objection to a recovery upon a writ of error; and as it was in another court than where the recovery was suffered, there was no room for intendments, which there cannot be in that court where the recovery itself was suffered, for there the Court is regulated by facts only. Besides, I must own, that I have no great opinion of the determination of that case: however, it is not like the present; and therefore upon the whole we cannot assent to make the first amendment, because it would not make the recovery better.

The second amendment, if it could be made, would set the recovery quite right; but we cannot grant it by the rules of law, nor is there anything to make such an amendment by, for the facts will not warrant it. The cases relied upon, as to this second amendment, were three precedents in *Mr. Pigott's Treatise of Recoveries*, 173, 174. which are all of them amendments in this court, about the fourth and fifth years of *William and Mary*, in which the Court ordered the return of the respective writs of entry to be altered, because returned before the date of the deed which was to make a tenant to the *præcipe*. The doctrine which prevailed at that time was, that the recovery was void, if there was not a tenant to the *præcipe* before the return of the writ of entry; but those cases in *Mr. Pigott* do not come up to the present; there they only amended the return and not the *teste*, but here it is prayed that both the *teste* and return may be altered. Besides, it is more than probable that all those cases were precedents upon consent, or for other reasons than are mentioned in the Book. As to the first of them, that of *Bunce v. Greenway, Pigott*, 173. that appears to be an amendment by consent; and by the rule it is also recited as a clear fact, that it was the misprision of the clerk; and it is said in the rule, that they read the deed, in which it was covenanted to suffer the common recovery, which warranted the amendment; and said in the rule also, that the amendment was made by the consent of all the parties. This makes it probable, if the other rules made in the case which *Mr. Pigott* has cited could be found, that they would differ from what he has reported. But the farthest that any of these rules went was to amend the return of the writ of entry, in order that there might be a tenant to it at its return.

SECONDLY, If this amendment could be made, yet here is nothing to amend by; for the deeds to declare the uses, which are the only things to amend by, shew it was the intention of the parties that no other writ of entry should be sued out than the present one; for the deed of release says, "that a recovery shall be suffered before the end of *Easter Term* next ensuing, or any other subsequent Term;" so that here is no pretence to say, that the parties designed to suffer a recovery in the *Hilary Term* before, or that

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See *Lacy v. Williams*, 12. Mod. 261.

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that a writ of entry should issue sooner than the present has done : but here, in order to make the recovery valid, the writ of entry must be *tested* before the deeds ; and if such a writ was permitted to have been taken out, that the vouchees appeared on the third of *February*, the consequence would be, that the recovery would be a recovery of *Hilary Term*, contrary to the agreement of the parties. Therefore we cannot make the second amendment desired. I do not know that in any cases at law we can shew favour upon equitable circumstances ; but if we could, the heir at law would be entitled to it, and not *Dr. Apperley*, who is a mere volunteer.

The recovery cannot be amended, and therefore the rule must be discharged.



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